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Elena Schiefele
Washington and Lee University School of Law, schiefele.e22@law.wlu.edu

When Statutory Interpretation Becomes Precedent: Why Individual Rights Advocates Shouldn't Be So Quick to Praise *Bostock*

Elena Schiefele*

Abstract

Justice Neil Gorsuch's approach to textualism, which this Note will call "muscular textualism," is unique. Most notably exemplified in Bostock v. Clayton County*, muscular textualism is marked by its rigorous adherence to what Justice Gorsuch perceives to be the "plain language" of the text. Because Justice Gorsuch's opinions exemplify muscular textualism in a structured and consistent manner, his appointment to the Supreme Court provides the forum from which he can influence the decision-making process of other members of the judiciary when they seek guidance from Supreme Court precedent. Accordingly, it is important for both advocates and judges to understand the muscular textualist analysis and its often rights-restrictive results.*

Muscular textualism departs from new textualism, the interpretive approach Justice Scalia promoted, in several respects. This Note focuses on two main differences between muscular textualism and new textualism: muscular textualism's enhanced literalness, which causes the interpreter to adopt the

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most basic, narrow, and superficial interpretation of the text rather than exploring the nuances of the phrase at issue, and muscular textualism's constrained view of what context interpreters may consider to discover the proper meaning of the text.

Part III of this Note applies the framework developed in Part II to two interpretive questions that have created a circuit split. First, it examines whether Section 2 of the Voting Rights Act prohibits restrictive voter ID laws. It then turns to Title III of the Americans with Disabilities Act and asks whether plasma centers are subject to compliance with Title III. Finally, this Note concludes by pointing to the potential impact of muscular textualism beyond the confines of statutory interpretation.

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INTRODUCTION

When the Supreme Court handed down its opinion in *Bostock v. Clayton County*[1] in June of 2020, the decision was hailed as proof that textualism was ideologically neutral.[2] The opinion, authored by Justice Neil Gorsuch, was a major victory for LGBT rights.[3] At the same time, it showed an unflinching adherence to the statute's text. *Bostock* demonstrates that though Justice Gorsuch's jurisprudence has been criticized for being results-oriented,[4] the statutory text sometimes leads him to a different conclusion than one would expect of a "conservative" justice.[5] In other cases, Justice Gorsuch's statutory interpretation has been rights-restrictive.[6] His approach to textualism is unique. As this Note demonstrates, the interpretive method in *Bostock* was neither an anomaly

1. 140 S. Ct. 1731 (2020).

2. *See* Cary Franklin, *Living Textualism*, 2021 SUP. CT. REV. (forthcoming 2021) (manuscript at 2) (on file with author) (describing the response to *Bostock*).

3. *See, e.g.*, Nina Totenberg, *Supreme Court Delivers Major Victory to LGBTQ Employees*, NPR (June 15, 2020, 10:19 AM), https://perma.cc/2K9P-PTYC ("The decision is a huge victory for the LGBTQ community . . . .").

4. Between Justice Gorsuch's nomination and confirmation to the Supreme Court, Senator Chuck Schumer lamented, "This country can ill afford another justice who will side with the powerful. Now, Judge Gorsuch may act like a studied neutral judge, but his record suggests he actually has a right-wing, pro-corporate special interest agenda." *U.S. Senate Session*, C-SPAN at 17:22 (Mar. 15, 2017), https://perma.cc/FK2F-SLCS; *see infra* note 305 and accompanying text.

5. Commentators typically group Justice Gorsuch with the Supreme Court's conservative bloc. *See, e.g.*, Robert Barnes & Seung Min Kim, '*Everything Conservatives Hoped for and Liberals Feared': Neil Gorsuch Makes His Mark at the Supreme Court*, WASH. POST (Sept. 6, 2019, 5:50 PM), https://perma.cc/M896-J2H5 ("[Justice Gorsuch] has established himself as one of the [C]ourt's most conservative justices . . . ."). However, Justice Gorsuch himself rejects ideological labelling of judges. *See Confirmation Hearing on the Nomination of Hon. Neil M. Gorsuch to be an Associate Justice of the Supreme Court of the United States: Hearing Before the Committee on the Judiciary*, 115th Cong. 70 (2017) ("[T]here is no such thing as a Republican judge or a Democratic judge. We just have judges in this country."). This Note therefore uses the term "conservative" to refer to a justice typically associated with the Court's conservative bloc.

6. *See, e.g.*, Artis v. District of Columbia, 138 S. Ct. 594, 608 (2018) (Gorsuch, J., dissenting) (interpreting the tolling provision in 28 U.S.C. § 1367 narrowly to bar the suit).

among Justice Gorsuch's jurisprudence, nor does it mark a shift toward rights-protective interpretation of statutes unarguably passed with a rights-protective purpose.[7] Instead, it illustrates that Justice Gorsuch adheres to the text more rigorously and more powerfully than his textualist colleagues. For that reason, this Note calls his methodology "muscular textualism."[8] Muscular textualism repeatedly results in a crabbed, formalistic, and narrow reading of the text that heightens the evidentiary burden of a plaintiff who has been wronged.[9] Even in *Bostock* itself, the muscular textualist interpretation of the statute was not as broad or protective as it first seemed.[10]

Because "the Supreme Court does not give stare decisis effect to doctrines of statutory interpretation methodology," theories of statutory interpretation at the Supreme Court evolve more quickly than non-methodological law.[11] Only four years after Justice Antonin Scalia's appointment to the Supreme Court, Professor William Eskridge observed that the Justice's critique of the Court's use of legislative history had "already changed the Court's practice in statutory interpretation cases."[12] More recently, advocates have begun to take note of Justice Gorsuch's unique approach to statutory interpretation and are arguing cases accordingly.[13]

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7. *See infra* Parts II–III.

8. Justice Gorsuch's interpretive methodology has also been called "formalistic textualism." *See* Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265, 275 (2020) (differentiating between "formalistic textualism" applied by Justice Gorsuch in the majority opinion in *Bostock*, and "flexible textualism" applied by the dissents).

9. *See, e.g.*, Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media, 140 S. Ct. 1009, 1014 (2020) (adopting a but-for causation test); *Minority Business Discrimination*, LDF (2021), https://perma.cc/AS32-XB9A ("The decision will make it more difficult to hold entities engaged in discrimination accountable for their actions. In its decision, the Court weakened . . . Section 1981, which requires that all citizens have the same rights to make and enforce contracts as white persons.").

10. *See infra* notes 290–291 and accompanying text.

11. Sydney Foster, *Should Courts Give Stare Decisis Effect to Statutory Interpretation Methodology*, 96 GEO. L.J. 1863, 1866 (2008).

12. William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 625 (1990) [hereinafter Eskridge, *The New Textualism*].

13. *See* Brief of Respondent Arizona Secretary of State Katie Hobbs at 18–20, Brnovich v. Dem. Nat'l Comm., 141 S. Ct. 2321 (2021) (No. 18-15845) (relying heavily on the reasoning in *Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media*, and *Bostock v. Clayton County*, in which Justice Gorsuch

Even before his appointment to the Supreme Court, then-Judge Gorsuch's statutory interpretation analysis served as precedent to other judges—precedent that severely restricted individual rights while purporting to merely effectuate the will of Congress.[14] Because Justice Gorsuch's opinions exemplify muscular textualism in a structured and consistent manner, his appointment to the Supreme Court provides the forum from which he can influence the decision-making process of other members of the judiciary when they seek guidance from Supreme Court precedent.[15] It is important for both advocates and judges to understand the muscular textualist analysis and its often rights-restrictive results.

Sometimes in the majority and sometimes in the dissent, Justice Gorsuch's rigorous adherence to what he perceives to be the "plain language" of the text stands out.[16] Justice Gorsuch's

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authored the majority opinions, to interpret Section 2 of the Voting Rights Act).

14. In *United States v. Surratt*, 797 F.3d 240, 244 (4th Cir. 2015), the Fourth Circuit interpreted the "savings clause" of 28 U.S.C. § 2255. *Id.* at 244. The majority relied heavily on Judge Gorsuch's extraordinarily narrow interpretation of the same statute in *Prost v. Anderson*, 636 F.3d 578 (10th Cir. 2011) to reach a similarly narrow result. *See Surratt*, 797 F.3d at 251–59 (citing repeatedly to *Prost*); *Prost*, 636 F.3d at 579–80 (finding that the defendant had no right to appeal his sentence even though the United States Supreme Court had re-interpreted the statute under which the defendant had been convicted such that he might not have been convicted at all if tried under the new interpretation); *see also* Brandon Hasbrouck, *Saving Justice: Why Sentencing Errors Fall Within the Savings Clause, 28 U.S.C. § 2255(e)*, 108 GEO. L.J. 287, 301–03 (2019) (explaining Judge Gorsuch's reasoning in *Prost*); Leah M. Litman, *Judge Gorsuch and* Johnson *Resentencing (This is Not a Joke)*, 115 MICH. L. REV. ONLINE 67, 67 (2017) (stating that Judge Gorsuch's opinion in *Prost* "overvalues proceduralism relative to substantive rights in a way that will have the effect of eroding litigants' access to courts").

15. *See supra* notes 11–13; Eskridge, *The New Textualism*, *supra* note 12, at 652 (stating that then-Judge Scalia was bound by Supreme Court practice while sitting on the Court of Appeals for the D.C. Circuit).

16. *See* Victoria Nourse, *Textualism 3.0: Statutory Interpretation After Justice Scalia*, 70 ALA. L. REV. 667, 682 (2019) (discussing Justice Gorsuch's approach to statutory interpretation); Romag Fasteners, Inc., v. Fossil, Inc., 140 S. Ct. 1492, 1494 (2020) (stating that a categorical rule adopted by several circuits cannot be upheld unless it "can be reconciled with the statute's plain language"); Thryv, Inc. v. Click-To-Call Techs., 140 S. Ct. 1367, 1381 (2020) (Gorsuch, J., dissenting) (rejecting an interpretation of a statute that would preclude judicial review of agency decisions in light of the statute's "plain language"); Niz-Chavez v. Garland, 141 S. Ct. 1474, 1486 (2021) ("[N]o amount of policy-talk can overcome a plain statutory command. Our only job today is

muscular textualism departs from new textualism, the theory of statutory interpretation that Justice Scalia promoted, in several respects.

This Note focuses on two main differences between muscular textualism and new textualism, which is most notable for its insistence that judges rely on the words in the statute and reject consideration of legislative history.[17] First, new textualism relies on "ordinary meaning," focusing on the common-sense, colloquial understanding of the words in the statute.[18] While Justice Gorsuch also purports to adhere to "ordinary meaning," muscular textualism frequently looks to the statute's "literal meaning," as derived from dictionaries as opposed to contemporaneous usage.[19] This makes muscular textualism more literal than new textualism, because it adheres to the most basic, narrow, and superficial interpretation rather than exploring the nuances of the phrase at issue.[20] The resulting interpretation is frequently more akin to "strict constructionism," an interpretive method that focuses on the

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to give the law's terms their ordinary meaning . . . . [W]ords are how the law constrains power."); BP P.L.C. v. Mayor of Baltimore, 141 S. Ct. 1532, 1542 (2021) ("'[E]ven the most formidable' policy arguments cannot 'overcome' a clear statutory directive. . . . [T]his Court's task is to discern and apply the law's plain meaning as faithfully as we can, not to 'assess the consequences of each approach and adopt the one that produces the least mischief.'" (internal citations omitted)).

17. *See* John F. Manning, *Second-Generation Textualism*, 98 CAL. L. REV. 1287, 1288 (2010) [hereinafter Manning, *Second-Generation Textualism*] ("Textualism maintains that judges seek statutory meaning in the semantic import of the enacted text and, in so doing, should reject the longstanding practice of using unenacted legislative history as authoritative evidence of legislative intent or purpose.").

18. *See infra* notes 60–70 and accompanying text.

19. *See* Nixon v. United States, 506 U.S. 224, 231 (1993) (considering both the "commonsense meaning" and "dictionary definition" of the term "sole" as used in the Impeachment Clause of the Constitution); WILLIAM N. ESKRIDGE, JR. ET AL., CASES AND MATERIALS ON STATUTORY INTERPRETATION 328 (2012) ("Ordinary meaning should be distinguished from literal meaning or strict construction; the latter connotes a narrow understanding of words used, while the former connotes the everyday understanding."); Niz-Chavez v. Garland, 141 S. Ct. 1474, 1480–81 (2021) (purporting to search for the ordinary meaning but then relying heavily on grammar and usage treatises).

20. *See infra* Part II.A.

most narrow, literal meaning of the words, ignoring all context.[21]

Second, muscular textualism takes a much more constrained view of what context interpreters may consider to discover the proper meaning of the text.[22] New textualism relies much more heavily on "subtextual context," textual context beyond the words in the phrase at issue and their definitions. Subtextual context includes other sections of the act, the structure of the act, or prior judicial interpretations of the terms.[23] New textualism also permits some consideration of certain types of extratextual context, including the historical and cultural background against which the statute was enacted—the text's "social context"—which muscular textualism rejects.[24] The result is that Justice Gorsuch's muscular textualism focuses more narrowly on the statutory text than Justice Scalia's new textualism.[25]

This Note does not purport to provide a comprehensive analytical framework. Instead, it focuses on two distinct nuances exemplified in Justice Gorsuch's opinions and highlighted by the dissents in *Bostock*.[26] It also does not claim to describe how Justice Gorsuch conceptualizes interpretive issues. It merely outlines the theory of statutory interpretation that judges or practitioners can derive from Justice Gorsuch's statutory interpretation jurisprudence based on the recurring themes in his opinions. To do so, it draws primarily on the statutory opinions he authored during his first five years on the Supreme Court and contrasts those opinions with new-textualist scholarship.

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21. *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 427 (2012) (defining strict constructionism as "[a]n interpretation according to the literal meaning of words, as contrasted with what the words denote in context according to a fair reading").

22. *See infra* Part II.B.

23. *See infra* Part II.B.2–4.

24. *See infra* Part II.B.1; Grove, *supra* note 8, at 280–81 (distinguishing between different types of context).

25. *See* Nourse, *supra* note 16, at 668 ("Justice Scalia is rightly deserving of praise for his insistence that statutory interpretation return to the text."); *Niz-Chavez*, 141 S. Ct. at 1480–82 (focusing narrowly on the meaning of the word "a").

26. *See supra* notes 18–25 and accompanying text.

Part I provides some background on interpretive methodologies.[27] Part II outlines and explains the muscular textualism framework.[28] Part III applies the framework developed in Part II to two interpretive issues that split the circuits.[29] Finally, the Conclusion points to the potential impact of muscular textualism beyond the confines of statutory interpretation.[30] Of course, at this stage it is impossible to predict what the impact of Justice Gorsuch's Supreme Court appointment will be, but it has become clear that he brings new ideas to many areas of the law that foreshadow change for many long-established doctrines.[31] Consequently, scholars, advocates, and the judiciary must grapple with his jurisprudence.

I. NEW TEXTUALISM

Until the 1980s, the Court frequently rejected "the apparent import of a statutory text" in favor of legislative intent or purpose as expressed in the legislative history.[32] The "prevailing judicial orthodoxy"[33] of the twentieth century is commonly known as "strong purposivism."[34] Strong purposivism permits judges "to consider virtually any contextual evidence, especially the statute's legislative history, even when the statutory text has an apparent 'plain meaning.'"[35]

New textualism arose in response to strong purposivism in the 1980s when scholars and judges "began to explore the tension between strong purposivism and legislative supremacy."[36] New textualists challenged purposivists'

27. *See infra* Part I.

28. *See infra* Part II.

29. *See infra* Part III.

30. *See infra* CONCLUSION.

31. *See infra* CONCLUSION.

32. Manning, *Second-Generation Textualism*, *supra* note 17, at 1291.

33. John F. Manning, *What Divides Textualists from Purposivists*, 106 COLUM. L. REV. 70, 73 (2006) [hereinafter Manning, *What Divides Textualists from Purposivists*].

34. *See* Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 23 (2006) (discussing the history of interpretive methodology in the Supreme Court).

35. Eskridge, *The New Textualism*, *supra* note 12, at 621.

36. Molot, *supra* note 34, at 24.

willingness to ignore the statute's text in favor of its purpose.[37] The success of this movement is, in large part, credited to Justice Scalia's appointment to the Supreme Court[38] and his "specially concurring or dissenting opinions arguing that the Court should ignore legislative history."[39] Today, textualism is the dominant interpretive methodology among members of the judiciary.[40] Perhaps due in part to new textualism's resounding success, textualism is no longer a uniform interpretive methodology.[41] With the Court's increasing rejection of purposivism in favor of textualism, "the divisions within textualism" become apparent, as judges and scholars continue to debate the best way to reach the text's plain meaning.[42]

Though new textualists purport to limit their analysis to the text of the statute, "the very process of ascertaining textual meaning inescapably entails resorting to extrastatutory—and thus unenacted—contextual clues."[43] Thus, the dispute between purposivists and textualists is not whether to consider statutory context, but rather which context to consider and how much weight to give to it.[44] Viewed in this light, muscular textualism

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37. *See* Grove, *supra* note 8, at 273 ("Beginning in the 1980s, textualists—led by Justice Scalia and Judge Easterbrook—mounted a campaign against this focus on the purpose and spirit, rather than the words, of a statute.").

38. *See* Nourse, *supra* note 16, at 668 ("Justice Scalia is rightly deserving of praise for his insistence that statutory interpretation return to the text.").

39. *See* Eskridge, *The New Textualism*, *supra* note 12, at 651.

40. *See* Harv. L. Sch., *The 2015 Scalia Lecture: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE at 8:29 (Nov. 25, 2015), https://perma.cc/TUU9-QRBC ("[We are] all textualists now . . . .").

41. *See* Nourse, *supra* note 16, at 668 (explaining that some Supreme Court Justices are "hard and dramatic textualists" while others are "low-key and pluralistic textualists").

42. Grove, *supra* note 8, at 267; *see* Nourse, *supra* note 16, at 668 ("If the decisions of 2018 are any indication, a unified method has not led to unified results. The truth is that textualism seems a neutral term that in fact is nothing but neutral. It harbors opposites.").

43. Manning, *What Divides Textualists from Purposivists*, *supra* note 33, at 75.

44. *See id.* at 76 ("[T]extualists and purposivists emphasize different elements of context. Textualists give precedence to *semantic context*—evidence that goes to the way a reasonable person would use language under the circumstances. Purposivists give priority to *policy context*—evidence that suggests the way a reasonable person would address the mischief being remedied.").

is not something completely new, but rather a continuation of the debate over how much weight to give to various types of context.[45]

Some scholars have argued that "[t]extualists have been so successful discrediting strong purposivism . . . that they can no longer identify, let along conquer, any remaining territory between textualism's adherents and nonadherents."[46] Responding to these arguments, Professor Jonathan Siegel contended that textualism's "prime directive"—that the "text *is* the law, and it is the text that must be observed"—has an "expansionist quality that causes textualism to become more radical with time."[47] He argues that this "fundamental axiom, combined with the tendency of the law to work itself pure, will keep textualists fighting indefinitely."[48] Textualists seem to be winning the fight—muscular textualism is a significant step toward "the radicalization" of textualist interpretation.[49]

II. JUSTICE GORSUCH'S INFLUENCE: THE MUSCULAR TEXTUALISM FRAMEWORK

Justice Gorsuch is a self-professed textualist.[50] But his opinions show that his approach to textualism differs from new

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45. *See* William N. Eskridge, Jr., *The New Textualism and Normative Canons*, 113 COLUM. L. REV. 531, 532 (2013) (reviewing ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012))

> [V]irtually all theorists and judges are "textualists" in the sense that they consider the text the starting point for statutory interpretation and follow statutory plain meaning if the text is clear. However . . . virtually all theorists and judges are also "purposivists" in the sense that all believe that statutory interpretation ought to advance statutory purposes, so long as such interpretations do not impose on words a meaning they will not bear. And virtually all theorists and judges insist that statutory context is important in discerning the meaning of statutory texts.

46. Molot, *supra* note 34, at 2.

47. Jonathan R. Siegel, *The Inexorable Radicalization of Textualism*, 158 U. PA. L. REV. 117, 120–21 (2009) (internal quotation omitted).

48. *Id.* at 122.

49. *Id.* at 170.

50. *See* NEIL GORSUCH, A REPUBLIC, IF YOU CAN KEEP IT 10 (2019) ("For me, respect for the separation of powers implies . . . textualism in the interpretation of statutes."); *cf.* Franklin, *supra* note 2, at 8

> [The problem] with textualism, from a democratic perspective, is that it vastly aggrandizes judicial power. It enables judges to rely

textualism as championed by Justice Scalia.[51] One notable difference is that muscular textualism is more literal than new textualism.[52] It is also more rigid with regard to what subtextual and historical context the interpreter may consider to determine the "ordinary public meaning of [a statute's] terms at the time of its enactment."[53] The result is frequently a narrow construction of the language and disregard for the harm that the statute was passed to redress.[54]

A. *Muscular Textualism's Strong Inclination Toward Literalness*

Muscular textualism is occasionally reminiscent of strict constructionism in that it looks to the literal meaning of the statutory language.[55] New textualists have decisively rejected

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> on normative and other forms of extratextual judgment while denying that they are doing so; it enables them to decide matters of paramount social importance without providing the people and their elected representatives with a complete account of their reasoning. That creates democratic accountability problems, and it also creates rule-of-law problems. It liberates judges from the burden of demonstrating that their conclusions are based in law and it deprives those governed by law of any real sense of the principles guiding judicial interpretation and of the likely implications of legal precedent.

51. *See* Grove, *supra* note 8, at 267 (differentiating between the "formalistic textualism" Justice Gorsuch applied in *Bostock* and the "flexible textualism" the dissents applied).

52. *See infra* Part II.A.

53. Bostock v. Clayton County, 140 S. Ct. 1731, 1738 (2020)

> After all, only the words on the page constitute the law adopted by Congress and approved by the President. If judges could add to, remodel, update, or detract from old statutory terms inspired only by extratextual sources and our own imaginations, we would risk amending statutes outside the legislative process reserved for the people's representatives. And we would deny the people the right to continue relying on the original meaning of the law they have counted on to settle their rights and obligations.

see Niz-Chavez v. Garland, 141 S. Ct. 1474, 1480 (2021) ("When exhausting [all textual and structural] clues enables us to resolve the interpretive question put to us, our 'sole function' is to apply the law as we find it."); *infra* Part II.B.

54. *See infra* Part III.

55. *Cf. Bostock*, 140 S. Ct. at 1825 (Kavanaugh, J., dissenting) ("Time and again, this Court has rejected literalism in favor of ordinary meaning."); *Niz-Chavez*, 141 S. Ct. at 1491 (Kavanaugh, J., dissenting) ("Ordinary

strict constructionism.[56] Justice Scalia called it "a degraded form of textualism that brings the whole philosophy into disrepute."[57] While Justice Gorsuch has not embraced strict constructionism explicitly, muscular textualism's literalism is evident in his opinions.[58]

In *Bostock*, Justice Gorsuch, writing for the majority, contended that the Court must interpret Title VII's[59] prohibition of discrimination on the basis of sex "in accord with the ordinary

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meaning and literal meaning are two different things. And judges interpreting statutes should follow ordinary meaning, not literal meaning."). To be sure, Justice Gorsuch pointed out that judges "must be attuned to the possibility that a statutory phrase ordinarily bears a different meaning than the terms do when viewed individually or literally." *Bostock*, 140 S. Ct. at 1750 (majority opinion). But an examination of his jurisprudence shows that he favors the literal meaning. *See infra* notes 69–81 and accompanying text.

56. *See* Caleb Nelson, *What is Textualism*, 91 VA. L. REV. 347, 376 (2005) ("[N]o mainstream judge is interested solely in the literal definitions of a statute's words . . . ."); Siegel, *supra* note 47, at 154 ("Good textualists do not insist that text must be interpreted literally and without consideration of context."); Manning, *What Divides Textualists from Purposivists*, *supra* note 33, at 81 n.40 ("Even within the realm of ordinary meaning, textualists must be sensitive to the fact that words sometimes have colloquial meanings that are widely understood but too obscure to have made their way into standard definitions."); SCALIA & GARNER, *supra* note 21, at 39 ("Some judges . . . diverge from [textualism] by 'strict constructionism'—a hyperliteral form of textualism that we equally reject."); SCALIA & GARNER, *supra* note 21, at 356 ("Textualists should object to being called strict constructionists. Whether they know it or not, that is an irretrievably pejorative term, as it ought to be. Strict constructionism, as opposed to fair-reading textualism, is not a doctrine to be taken seriously.").

57. ANTONIN SCALIA, A MATTER OF INTERPRETATION 23 (1997) ("[T]he good textualist is not a literalist . . . .").

58. *See Niz-Chavez*, 141 S. Ct. at 1484

> [W]hen interpreting this or any statute, we do not aim for "literal" interpretations . . . . We simply seek the law's ordinary meaning. . . . If, in the process of discerning that meaning, we happen to consult grammar and dictionary definitions . . . we do so because the rules that govern language often inform how ordinary people understand the rules that govern them.

Bostock, 140 S. Ct. at 1825 (Kavanaugh, J., dissenting) (accusing the majority of following the text's "literal meaning" instead of its "ordinary meaning"); Leah Litman & Kate Shaw, *Burn Book on Purposivism*, STRICT SCRUTINY at 18:30 (May 3, 2021), https://perma.cc/WDA2-RR7A (contrasting Justice Kavanaugh's ordinary meaning and Justice Gorsuch's literal meaning).

59. Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 701–716, 78 Stat. 241, 253–66 (1964).

public meaning of its terms at the time of its enactment."[60] The majority proceeded to interpret the statute's text by relying on prior Supreme Court interpretations, contemporaneous dictionary definitions, and, to a lesser extent, the text of the rest of the statute.[61] This is consistent with new textualism.[62] But there was significant discord between the majority and dissenting opinions, all of which purported to be correctly following the textualist method, as to whether an employer who fires an employee because of his or her sexual orientation or sexual identity discriminated against that employee because of "sex." Both dissenting opinions accuse the majority of dishonoring the most fundamental principle of new textualism: that only the statutory text itself, as understood at the time of its enactment, carries the force of law.[63] Justice Alito compared the majority's opinion to a pirate ship.[64] He stated that the opinion "sails under a textualist flag, but what it actually represents is a theory of statutory interpretation that Justice Scalia excoriated—the theory that courts should 'update' old statutes so that they better reflect the current values of society."[65]

Justice Kavanaugh's criticism was less rhetorical, but it portrayed the majority opinion more accurately. He accused the majority of applying "[a] literalist approach to interpreting phrases [that] disrespects ordinary meaning and deprives the

60. *Bostock*, 140 S. Ct. at 1738 (majority opinion); *see* BP P.L.C. v. Mayor of Baltimore, 141 S. Ct. 1532, 1537 (2021) ("When called on to interpret a statute, this Court generally seeks to discern and apply the ordinary meaning of its terms at the time of their adoption.").

61. *See Bostock*, 140 S. Ct. at 1739–41 (interpreting Title VII's prohibition of discrimination because of sex).

62. *See* Baker Botts L.L.P. v. ASARCO LLC, 576 U.S. 121, 128 n.2 (2015) (Thomas, J.) (stating that the court must "look to the ordinary meaning" of the words in the statute at the time they were enacted); SCALIA & GARNER, *supra* note 21, at 69–92 (explaining the ordinary-meaning and fixed-meaning canons).

63. *See* Bostock v. Clayton County, 140 S. Ct. 1731, 1835 (2020) (Kavanaugh, J., dissenting) (criticizing the majority opinion for "overlooking the ordinary meaning of the phrase 'discriminate because of sex'").

64. *See id.* at 1755 (Alito, J., dissenting) ("The Court attempts to pass off its decision as the inevitable product of the textualist school of statutory interpretation championed by our late colleague Justice Scalia, but no one should be fooled.").

65. *Id.* at 1755–56.

citizenry of fair notice of what the law is."[66] As he further stated, "[T]his Court's precedents and longstanding principles of statutory interpretation teach a clear lesson: Do not simply split statutory phrases into their component words, look up each in a dictionary, and then mechanically put them together again . . . . [T]his approach misses the forest for the trees."[67] But frequently this is exactly what lower court judges and advocates see when looking to muscular textualist opinions for guidance.[68] *Bostock* and Justice Gorsuch's other opinions break down the language at issue and first look at the dictionary definitions of the terms.[69] This differs significantly from new textualism, which looks to subtextual context first.[70]

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66. *Id.* at 1828 (Kavanaugh, J., dissenting).

67. *Id.* at 1827.

68. *See supra* notes 11–13 and accompanying text.

69. *See Bostock*, 140 S. Ct. at 1739–40 (majority opinion) (looking to contemporaneous dictionaries to determine the contemporary understanding of the statutory terms); Atl. Richfield Co. v. Christian, 140 S. Ct. 1335, 1364 (2020) (Gorsuch, J., concurring in part and dissenting in part) (same); Food Mktg. Inst. v. Argus Leader Media, 139 S. Ct. 2356, 2363 (2019) (same); BNSF Ry. Co. v. Loos, 139 S. Ct. 893, 906 (2019) (same); New Prime Inc. v. Oliveira, 139 S. Ct. 532, 541 (2019) (same); Wis. Cent. Ltd. v. United States, 138 S. Ct. 2067, 2071 (2018) (same); Murphy v. Smith, 138 S. Ct. 784, 787 (2018) (same); *BP P.L.C.*, 141 S. Ct. at 1537–38 (same).

70. *See* Herrmann v. Cencom Cable Assocs., 978 F.2d 978, 982 (7th Cir. 1992) (Easterbrook, J.) ("Statutes have meanings, sometimes even 'plain' ones, but these do not spring directly from the page . . . . Slicing a statute into phrases while ignoring their contexts—the surrounding words, the setting of the enactment, the function a phrase serves in the statutory structure—is a formula for disaster."); SCALIA & GARNER, *supra* note 21, at 356 ("The full body of a text contains implications that can alter the literal meaning of individual terms."); ESKRIDGE, JR. ET AL., *supra* note 19, at 253

> [J]udges have used the term "plain meaning" loosely, sometimes to mean a textual interpretation that is pretty obvious on the face of the statute . . . and sometimes to mean something similar to Justice Scalia's expression of the best textual understanding that emerges from close analysis of statutory provisions that, at the outset, may have seemed ambiguous, confusing or at least complicated. The former approach to plain meaning is akin to a pretty literal approach to the face of the statute; the latter approach of Justice Scalia sees statutory interpretation to be something like a word puzzle, capable of being solved in almost all cases with a best answer emerging.

For example, in *New Prime, Inc. v. Oliveira*,[71] the Court faced the question of whether the statutory term "contracts of employment" includes "contracts that require an independent contractor to do work," or only "contracts that reflect an employer-employee relationship."[72] The employer in *Oliveira* sought to compel arbitration under its contract with the employee.[73] Under the Federal Arbitration Act,[74] courts do not have authority to compel arbitration for "contracts of employment" of workers engaged in interstate commerce.[75] Justice Gorsuch, writing for the majority, began with the definition of the term "employment" in various dictionaries from 1925, the year the statute was enacted.[76] He determined that the contemporaneous dictionary definition includes contracts of independent contractors as well as contracts establishing employer-employee relationships.[77] Only then did Justice Gorsuch look to the context supplied by the rest of the sentence.[78] The majority concluded that the term "workers" in the second half of the sentence confirmed what it had gleaned from the dictionaries: "that Congress used the term 'contracts of employment' in a broad sense to capture any contract for the performance of *work* by *workers*."[79] Of course, new textualism also relies heavily on dictionary definitions of the terms at issue.[80] The difference lies in the relative amounts of weight

71. 139 S. Ct. 532 (2019).

72. *Id.* at 539.

73. *Id.* at 536.

74. 9 U.S.C. § 1.

75. *See Oliveira*, 139 S. Ct. at 536–37 (explaining the scope of the Act).

76. *See id.* ("It turns out . . . that the dictionaries of the era consistently afforded the word 'employment' a broad construction, broader than may be often found in dictionaries today.").

77. *See id.* at 540 (stating that in 1925 "[a]ll work was treated as employment, whether or not the common law criteria for a master-servant relationship happened to be satisfied").

78. *See id.* ("More confirmation yet comes from a neighboring term in the statutory text.").

79. *Id.* at 541.

80. *See* John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2456 (2005) [hereinafter Manning, *The Absurdity Doctrine*] ("[T]extualists . . . frequently consult dictionaries as historical records of social meanings that speakers have attached to words . . . ."); SCALIA & GARNER, *supra* note 21, at 36 ("With a terminological issue . . . we should consult (without apology) what the lexicographers say.").

given to the dictionary definitions and the immediate context of the text.[81]

While Justice Gorsuch routinely begins with the dictionary, Justice Scalia's opinions may not even reach the dictionary. For example, in *West Virginia University Hospitals v. Casey*,[82] Justice Scalia relied on other statutes and Court precedent to interpret the fee shifting provision in 42 U.S.C. § 1988.[83] The question before the Court was whether expert witness costs can be shifted to the losing party under § 1988, which permits shifting of "a reasonable *attorney's fee*."[84] Justice Scalia first consulted the language of fee shifting provisions in other statutes, particularly noting that several expressly permit shifting of expert witness costs.[85] He concluded that "this statutory usage shows beyond question that attorney's fees and expert fees are distinct items of expense."[86] He then turned to the "judicial background" that existed before the enactment of § 1988, and determined that judicial practices at the time confirmed the conclusion.[87] He never consulted dictionary

81. *Compare* SCALIA & GARNER, *supra* note 21, at 167 ("Context is a primary determinant of meaning."), *with* Nourse, *supra* note 16, at 673 (stating that Justice Gorsuch's opinions further emphasize the "'intense decontextualization' (meaning the intensification of text-parsing methodology) that began with Justice Scalia's new textualism").

82. 499 U.S. 83 (1991).

83. 42 U.S.C. § 1988. While *Casey* may initially appear to be distinguishable from Justice Gorsuch's statutory interpretation jurisprudence because the language at issue in *Casey* is specific to the judicial process, this argument does not hold. In *Artis v. District of Columbia*, 138 S. Ct. 594 (2018), Justice Gorsuch, writing in dissent, interpreted the tolling provision in 28 U.S.C. § 1367(d). *See* 138 S. Ct. at 608 (Gorsuch, J., dissenting) (setting out the disputed statutory terms). This provision, like § 1988, governs the judicial process. But here too, Justice Gorsuch began by consulting contemporaneous dictionaries to determine the meaning of the word "toll." *See Artis*, 138 S. Ct. at 606 (Gorsuch, J., dissenting) ("The dictionary informs us that to 'toll' means '[t]o take away bar, defeat [or] annul.'" (quoting *Toll*, OXFORD ENGLISH DICTIONARY (2d ed. 1989)) (alterations in original)).

84. *Casey*, 499 U.S. at 85 (quoting § 1988) (internal quotation marks omitted) (emphasis added).

85. *See id.* at 88 ("While some fee-shifting provisions, like § 1988, refer only to 'attorney's fees,' many others explicitly shift expert witness fees *as well as* attorney's fees." (internal citation omitted)).

86. *Id.* at 92.

87. *See id.* at 92–97 (examining fee shifting practices before the statute's enactment).

definitions of "attorney's fees."[88] By beginning with the dictionary definitions of the terms at issue, muscular textualism departs from new textualism in that it interprets the statute based on its literal rather than its ordinary meaning.[89]

Because muscular textualism is more literal than new textualism, muscular textualists[90] are less likely to conclude that the text is ambiguous.[91] During the Court's October 2019 term, for example, Justice Gorsuch wrote the majority opinion or a separate opinion in six statutory interpretation cases.[92] He only found the language to be ambiguous in one case, *Comcast Corp. v. National Association of African American-Owned Media*,[93] discussed in Part II.C, where the statute did not address the issue before the Court.[94] In several of the cases

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88. *See id.* at 88–97 (relying exclusively on "statutory" and "judicial usage").

89. *See* Bostock v. Clayton County, 140 S. Ct. 1731, 1828 (2020) (Kavanaugh, J., dissenting) ("Statutory interpretation 101 instructs courts to follow ordinary meaning not literal meaning, and to adhere to the ordinary meaning of phrases, not just the meaning of the words in a phrase.").

90. This Note recognizes that not all judges adopt one method of statutory interpretation. For simplicity's sake, however, this Note will refer to those applying a muscular textualist analysis as "muscular textualists."

91. *See* Manning, *The Absurdity Doctrine*, *supra* note 80, at 2392–93

> Even the strictest modern textualists properly emphasize that language is a social construct. They ask how a reasonable person, conversant with the relevant social and linguistic conventions would read the text in context. This approach recognizes that the literal or dictionary definitions of words will often fail to account for settled nuances or background conventions that qualify the literal meaning of the language, and, in particular, of legal language.

SCALIA & GARNER, *supra* note 21, at 356 ("Adhering to the *fair meaning* of the text (the textualist's touch-stone) does not limit one to the hyperliteral meaning of each word in the text.").

92. *See generally Bostock*, 140 S. Ct. 1731 (interpreting 42 U.S.C. § 2000e); Opati v. Republic of Sudan, 140 S. Ct. 1601 (2020) (interpreting 28 U.S.C. § 1605); Romag Fasteners, Inc. v. Fossil, Inc., 140 S. Ct. 1492 (2020) (interpreting 15 U.S.C. § 1117); Atl. Richfield Co. v. Christian, 140 S. Ct. 1335 (2020) (Gorsuch, J., concurring in part and dissenting in part) (interpreting 42 U.S.C. § 9622); Thryv, Inc. v. Click-To-Call Techs., LP, 140 S. Ct. 1367 (2020) (Gorsuch, J., dissenting) (interpreting 35 U.S.C. § 314); Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media, 140 S. Ct. 1009 (2020) (interpreting 42 U.S.C. § 1981).

93. 140 S. Ct. 1009 (2020).

94. *See id.* at 1015 ("While the statute's text does not expressly discuss causation, it is suggestive.").

where Justice Gorsuch's muscular textualist analysis found the text to be unambiguous, other justices disagreed.[95]

In *SAS Institute Inc. v. Iancu*,[96] SAS brought several claims against another company's patents.[97] The statute provides that "[i]f inter partes review is instituted" by the Director, the Board "shall issue a final decision with respect to the patentability of any claim challenged by the petitioner."[98] The Director of the Patent Office claimed that "he retain[ed] discretion to decide" which claims would receive inter partes review by the Board.[99] The Court had to determine whether the phrase "any patent claim challenged by the petitioner," as used in 35 U.S.C. § 318(a),[100] required review of every claim in the original petition or whether it permitted the Director to decide which claims would receive review.[101] The majority's muscular textualist analysis, authored by Justice Gorsuch, concluded that the language was unambiguous.[102] He relied on the words "shall" and "any" in the statute, which, he claimed, created a nondiscretionary duty on the part of the Board to consider "*every* claim the petitioner ha[d] challenged."[103]

Justice Breyer, joined by three other justices, disagreed.[104] Justice Breyer stated, "The words 'in the petitioner's original petition' do not appear in the statute. And the words that do appear, 'any patent claim challenged by the petitioner,' could be

95. *See* Wis. Cent. Ltd. v. United States, 138 S. Ct. 2067, 2075 (2018) (Breyer, J., dissenting) ("In my view, the language itself is ambiguous."). *But see* Artis v. District of Columbia, 138 S. Ct. 594, 602–03 (2018) (stating that the language at issue has only one permissible meaning while Justice Gorsuch, dissenting, found that it had two).

96. 138 S. Ct. 1348 (2018).

97. *See id.* at 1354 (explaining the facts that gave rise to the litigation).

98. 35 U.S.C. § 318(a).

99. *Iancu*, 138 S. Ct. at 1355.

100. 35 U.S.C. § 318(a).

101. *See Iancu*, 138 S. Ct. at 1361 (Breyer, J., dissenting) (explaining the issue before the Court).

102. *See id.* at 1355 (majority opinion) ("We find that the plain text of § 318(a) supplies a ready answer.").

103. *Id.* at 1354.

104. *See id.* at 1361 (Breyer, J., dissenting) ("I cannot find much in the statutory context to support the majority's claim that the statutory words 'challenged by the petitioner' refer unambiguously to claims challenged initially in the petition.").

modified by using different words that similarly do not appear . . . ."[105] The statute did not reveal "whether the relevant challenge is one made in the initial petition or only one made in the inter partes review proceeding itself."[106] Because Justice Gorsuch focused narrowly on the literal meaning of two specific words in the statute, "shall" and "any," he did not find the ambiguity that Justice Breyer's broader approach identified.[107]

Muscular textualism's enhanced literalism makes it less likely that the analysis will find ambiguity in the text, which means that it will rely on subtextual and extratextual context less frequently.[108] This phenomenon is particularly clear if one compares muscular textualism to purposivism. In *United Steelworkers of America v. Weber*,[109] a quintessential purposivist opinion, Justice Brennan wrote, "[I]t is a 'familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers.'"[110] He acknowledged that the "literal construction" of the statute was unambiguous but nonetheless turned to the statute's context because of the ambiguity created by the disagreement between the statute's plain terms and its purpose.[111] Thus, even though the statute was clear, Justice

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105. *Id.* at 1361–62.

106. *Id.* at 1362.

107. *See id.* at 1360 (stating that the statute contains "a gap that Congress implicitly delegated authority to the agency to fill").

108. *See* Bostock v. Clayton County, 140 S. Ct. 1731, 1749 (2020) ("This Court has explained many times over many years that, when the meaning of the statute's terms is plain, our job is at an end."); Food Mktg. Inst. v. Argus Leader Media, 139 S. Ct. 2356, 2364 (2019)

> In statutory interpretation disputes, a court's proper starting point lies in a careful examination of the ordinary meaning and structure of the law itself. Where, as here, that examination yields a clear answer, judges must stop. Even those of us who sometimes consult legislative history will never allow it to be used to "muddy" the meaning of "clear statutory language." (quoting Milner v. Dep't of Navy, 562 U.S. 562, 672 (2011)) (internal citations omitted).

109. 443 U.S. 193 (1979).

110. *Id.* at 201 (quoting Holy Trinity Church v. United States, 143 U.S. 457, 459 (1892)).

111. *See id.* at 202 ("[A]n interpretation of [Title VII] that forbade all race-conscious affirmative action would 'bring about an end completely at variance with the purpose of the statute' and must be rejected." (citation omitted)).

Brennan's purposivist opinion in *Weber* not only considered context but ignored the unambiguous text in favor of that context.

By contrast, new textualists maintain "that courts must respect the terms of an enacted text *when its semantic meaning is clear*," and refuse to let context such as statutory purpose override the statutory text.[112] The disparate use of context is therefore less extreme between muscular textualism and new textualism than between muscular textualism and purposivism.[113] But because new textualists "accept the contemporary notion that language only has meaning when considered in context," they, too, look further than muscular textualism permits to determine whether the text is ambiguous.[114] For example, new textualism applies canons of construction to determine the ordinary meaning of the text, while muscular textualism first determines the text's meaning and, as long as the meaning is unambiguous, rejects application of any canons that point to a different result.[115] Because the new textualist's approach to interpretation is more permissive about context, new textualists are more likely to find ambiguity.[116]

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112. Manning, *Second-Generation Textualism*, *supra* note 17, at 1309.

113. *Id.*

114. Molot, *supra* note 34, at 35.

115. *Compare* Manning, *What Divides Textualists from Purposivists*, *supra* note 33, at 92

> Textualists start with contextual evidence that goes to customary usage and habits of speech; they believe that a statute may have a clear semantic meaning, even if that meaning is not plain to the ordinary reader without further examination . . . . This inquiry . . . also includes consideration of specialized trade usage, substantive canons of clear statement . . . and colloquial nuances that may be widely understood but are unrecorded in standard dictionaries.

with United States v. Davis, 139 S. Ct. 2319, 2332 (2020) (stating that the constitutional avoidance canon cannot be applied "to *expand* the reach of a criminal statute in order to save it").

116. *But see* John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 109–11 (2001) (explaining that new textualism's consideration of context precludes some interpretations of the language that a more literal approach might permit).

B. *What Context Should Be Considered?*

In the early 2000s, Professor Jonathan Molot alleged that new textualism routinely looks at context beyond the four corners of the statute.[117] This is, of course, true.[118] But new textualism narrowed the scope of permissible context, primarily by excluding legislative history from consideration.[119] Muscular textualism continues that trend by focusing almost exclusively on semantic context, as portrayed by the terms of the statute and their definitions.[120] Even similar language in other statutes is rarely given any weight.[121] But the overall structure of the statutory scheme is still relevant,[122] as is statutory history.[123]

1. Social Context Is Ignored

New textualism acknowledges that "meaning is a function of the way speakers use language in particular circumstances."[124] Because dictionary definitions cannot capture these nuances, new textualists must necessarily determine a statute's meaning based on the social context in which it was enacted.[125] By contrast, muscular textualists weigh textual context more heavily than social context and societal

117. *See* Molot, *supra* note 34, at 35 ("[T]extualists may criticize strong purposivism for giving too much weight to context, and for emphasizing certain kinds of context (legislative history) that textualists think should be off limits, but modern textualists do not, in principle, object to the notion that judges should look to context as well as text.").

118. *See* Jonathan R. Siegel, *Textualism and Contextualism in Administrative Law*, 78 B.U. L. REV. 1023, 1028 (1998) ("Textualism is not 'wooden'; it recognizes that consulting context is part of the interpretive process.").

119. *See id.* at 1028–29 ("Textualists simply deny that legislative history forms part of that context. Rather, they say, the context comes from elsewhere: from, for example, dictionaries, or from the whole statute . . . or from other statutes in which similar language is used.").

120. *See infra* Part II.B.1.

121. *See infra* Part II.B.2.

122. *See infra* Part II.B.3.

123. *See infra* Part II.B.4.

124. Manning, *The Absurdity Doctrine*, *supra* note 80, at 2457.

125. *See id.* at 2458 ("[B]ecause dictionaries have a limited capacity to record the nuances of usage, widely shared contextual understandings may identify colloquial refinements of even the most locally applicable dictionary definitions.").

understandings of the language at the time of enactment.[126] Dissenting in *Bostock*, Justice Alito stated, "If every single living American had been surveyed in 1964, it would have been hard to find any who thought that discrimination because of sex meant discrimination because of sexual orientation—not to mention gender identity, a concept that was essentially unknown at the time."[127] Justice Alito's dissent was joined in full by Justice Thomas, one of the Court's strictest adherents to new textualism.[128] Conversely, the majority's muscular textualist analysis gave the text "the ordinary public meaning of its *terms* at the time of its enactment."[129] It looked at "the words on the page" not at how the average citizen or congressperson would have interpreted them.[130] The majority's interpretation was based on contemporaneous dictionary definitions of the individual terms, not contemporaneous societal understanding of the phrase.[131] While the majority relied on dictionaries, the dissent derived the statute's meaning based on the inferences it drew from contemporaneous usage of the terms.[132] Unlike the dissent, the majority did not give the *phrase* its "ordinary public

126. *See* Bostock v. Clayton County, 140 S. Ct. 1731, 1737 (2020) ("When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law . . . .").

127. *Id.* at 1755 (Alito, J., dissenting); *see* Grove, *supra* note 8, at 283–84 (explaining that the majority and dissent reached different conclusions because of their disparate treatment of social context).

128. *See* Grove, *supra* note 8, at 283 (stating that Justice Thomas "has been described as one of the Court's 'most committed textualists'" (citation omitted)).

129. *Id.* at 1738 (emphasis added).

130. *See Bostock*, 140 S. Ct. at 1738–39 (majority opinion) ("[W]e . . . begin by examining the key statutory terms in turn before assessing their impact on the cases at hand and then confirming our work against this Court's precedents.").

131. *See supra* notes 67–89 and accompanying text.

132. *See Bostock*, 140 S. Ct. at 1756 (Alito, J., dissenting) (arguing that "discrimination because of sex" cannot encompass the employer's decision to fire the employee because of her "gender identity, a concept that was essentially unknown at the time").

meaning," because it entirely ignored contemporaneous social context.[133]

Bostock is just one example of muscular textualism's unequivocal disregard of social context. In *United States v. Davis*,[134] the Court interpreted the residual clause in 18 U.S.C. § 924(c),[135] which defined a "crime of violence" as a felony "that by its nature, involves a substantial risk that physical force against the person or property of another may be used."[136] The question was whether this risk was based on the predicate offense's "imagined 'ordinary case'" or "the defendant's actual conduct."[137] The majority determined that the statute refers to the "ordinary case," not the specific facts of the case.[138] The dissent argued that an average member of the public would not agree with the majority's rejection of a case-specific interpretation of the text.[139] Justice Gorsuch, writing for the majority, dismissed this argument as "the dissent's push poll."[140] Like in *Bostock*, the majority's muscular textualist analysis refused to consider contemporary societal usage of the phrase.[141] If judges rely on these muscular textualist opinions for guidance in future statutory interpretation cases, they will be less willing to consider social context.[142]

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133. *See id.* at 1825 (Kavanaugh, J., dissenting) ("[C]ourts must adhere to the ordinary meaning of *phrases*, not just the meaning of the words in a phrase." (emphasis added)).

134. 139 S. Ct. 2319 (2019).

135. 18 U.S.C. § 924(c)(3)(B).

136. *Id.*

137. *Davis*, 139 S. Ct. at 2327–28 (internal quotation omitted).

138. *See id.* at 2329 ("[I]n plain English, when we speak of the nature of an offense, we're talking about 'what an offense normally—or, as we have repeatedly said, "ordinarily"—entails, not what happened to occur on one occasion.'" (quoting Sessions v. Dimaya, 138 S. Ct. 1204, 1217 (2018))).

139. *See id.* at 2343 (Kavanaugh, J., dissenting) (borrowing the Court of Appeals's argument that the public would disagree with the majority's interpretation).

140. *Id.* at 2334 (majority opinion).

141. *See id.* (defending its interpretation as "a categorical reading of this categorical language [that] seemed anything but 'unnatural'" to the Court in prior cases).

142. *See* Grove, *supra* note 8, at 269 ("Formalistic textualism emphasizes semantic context, rather than social or policy context . . . .").

2. Statutory Context Is Rarely Relevant

New textualism considers language in related or surrounding statutes when interpreting the language or provision at issue.[143] Under a muscular textualist analysis, in the absence of expressly clear language to the contrary, related statutes have little bearing on the meaning of the provision at issue.[144] Even where two words are understood to be synonymous in common parlance, only identical language can inform the interpretation.[145] In fact, the difference in language is generally strong evidence that the two phrases cannot mean the same thing.[146]

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143. *See* Eskridge, *The New Textualism*, *supra* note 12, at 669 ("The new textualism considers as context dictionaries and other grammar books, *the whole statute, analogous provisions in other statutes*, canons of construction, and the common sense God gave us." (emphasis added)); SCALIA & GARNER, *supra* note 21, at 252 ("Any word or phrase that comes before a court for interpretation is part of a whole statute, and its meaning is therefore affected by other provisions of the same statute.").

144. *See* Thryv, Inc. v. Click-To-Call Techs., LP, 140 S. Ct. 1367, 1381 (2020) (finding that a "determination by the Director" whether to institute inter partes review is not the same as an affirmative temporal limitation during which "inter partes review may not be instituted" (citing 35 U.S.C. §§ 314(d), 315)); Va. Uranium, Inc. v. Warren, 139 S. Ct. 1894, 1903 (2019) (finding that limiting language in another section applied only to "the activities discussed in that *same section*" (citing 42 U.S.C. § 2021)); Opati v. Republic of Sudan, 140 S. Ct. 1601, 1609 (2020) (finding that Congress expressly made a new provision applicable to the provision at issue (citing 28 U.S.C. § 1605A)); Yellen v. Confederated Tribes of Chehalis Rsrv., 141 S. Ct. 2434, 2456 (2021) (Gorsuch, J., dissenting) (relying on another statute where it uses "language materially identical to" the provision at issue in the case).

145. *See* Atl. Richfield Co. v. Christian, 140 S. Ct. 1335, 1365 (2020) (Gorsuch, J., dissenting in part) (rejecting similar but not identical language in another section as irrelevant because it would be "linguistic contortion" to conclude that "different language" can have the same meaning); Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media, 140 S. Ct. 1009, 1018 (2020) ("[W]e normally assume [that] differences in language imply differences in meaning."); Azar v. Allina Health Servs., 139 S. Ct. 1804, 1814 (2019) ("[T]he phrase 'substantive legal standard,' which appears in [§ 1395hh(a)(2)] and apparently nowhere else in the U.S. Code, cannot bear the same construction as the term 'substantive rule' in the APA."); BP P.L.C. v. Mayor of Baltimore, 141 S. Ct. 1532, 1539 (2021) ("[A]ll of the parties' fencing about language Congress *didn't* use persuades us of only one thing—that we are best served by focusing on the language it *did* employ.").

146. *See* Bostock v. Clayton County, 140 S. Ct. 1731, 1739 (2020) (noting the significance of the fact that Congress took a "more parsimonious approach" in other statutes); BNSF Ry. Co. v. Loos, 139 S. Ct. 893, 907 (2019) (Gorsuch,

Justice Gorsuch's majority opinion in *Wisconsin Central Ltd. v. United States*[147] illustrates this principle. In *Wisconsin Central*, railroads sought refunds for employment taxes that they claimed to have overpaid under the Railroad Retirement Tax Act (RRTA).[148] The Court had to determine whether the railroad employee's stock options constitute "money remuneration" as that term is used in the RRTA.[149] The government argued that the statutory term "money" should be defined broadly to include the stock options.[150] The majority rejected this argument.[151] In so doing, it pointed out that "differences in language . . . convey differences in meaning."[152] It stated that Congress "took pains to differentiate between money and stock" throughout title 26 of the U.S. Code.[153] The majority also pointed out that the Federal Insurance Contributions Act (FICA),[154] "taxes '*all* remuneration,'" while the RRTA "taxes only '*money* remuneration.'"[155] The majority deemed these textual discrepancies to be strong evidence that "money remuneration" does not include the stock options and

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J., dissenting) (concluding that because a related statute expressly includes "'pay for time lost' in the definition of 'compensation'" the statute at issue must exclude such payments (quoting 45 U.S.C. § 231(h)(1))); *BP P.L.C.*, 141 S. Ct. at 1538 (comparing the language in 28 U.S.C. § 1447(d), which permits appellate review of "an order" remanding a case after removal pursuant to 28 U.S.C. § 1442, with 28 U.S.C. § 1446(b)(2)(A), which refers to actions "'removed *solely* under' the diversity jurisdiction statute").

147. 138 S. Ct. 2067 (2018).

148. Railroad Retirement Tax Act, 26 U.S.C. §§ 3201–3241; s*ee* Wis. Cent. Ltd. v. United States, 194 F. Supp. 3d 728, 731 (N.D. Ill. 2016) (describing the nature of the suit).

149. *See Wis. Cent. Ltd.*, 138 S. Ct. at 2075 (Breyer, J., dissenting) (explaining the issue before the Court).

150. *See id.* at 2072 (majority opinion) ("At least sometimes, the government says, 'money' means any 'property or possessions of any kind viewed as convertible into money or having value expressible in terms of money.'" (citing *Money*, OXFORD ENGLISH DICTIONARY (1st ed. 1933))).

151. *See id.* ("[W]hile the term 'money' *sometimes* might be used in this much more expansive sense, that isn't how the term was *ordinarily* used at the time of the Act's adoption (or is even today).").

152. *Id.* at 2071.

153. *See id.* (citing several examples from the 1939 Internal Revenue Code).

154. Federal Insurance Contributions Act (FICA), 26 U.S.C. §§ 3101–3128.

155. *Wis. Cent. Ltd.*, 138 S. Ct. at 2071.

therefore ruled in favor of the railroads.[156] As *Wisconsin Central* illustrates, a muscular textualist must generally conclude that even slight discrepancies in the statutory language will change the meaning of the text.[157] Unless the language is identical, specific language in related statutes provides evidence of what the meaning is not, as opposed to what it is.[158]

3. Statutory Structure Deserves Consideration

Though specific language in related statutes rarely informs the interpretation, the general structure of the broader statutory scheme does carry some weight.[159] In *Virginia Uranium Inc. v. Warren*,[160] the question before the Court was whether the Atomic Energy Act (AEA)[161] preempted Virginia state law.[162] Justice Gorsuch, writing for the majority, applied a muscular textualist analysis and concluded that the AEA did not preempt state law.[163] Virginia Uranium contended that the

156. *See id.* ("Pretty obviously, stock options do not fall within that definition.").

157. *See supra* notes 146–156 and accompanying text.

158. *Cf.* Pereida v. Wilkinson, 141 S. Ct. 754, 761 (2021) (noting that language mandating the burden of proof was identical for all four statutory requirements and the plaintiff identified "nothing in the statutory text singling out this lone requirement for special treatment"); *id.* ("Congress knows how to assign the government the burden of [proof]. And Congress's decision to do so in some proceedings, but not in [the proceedings at issue], reflects its choice that these different processes warrant different treatment.").

159. *See* Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media, 140 S. Ct. 1009, 1015 (2020) (discussing the effect of the "larger structure . . . of the Civil Rights Act"); Va. Uranium Inc. v. Warren, 139 S. Ct. 1894, 1902 (2019) (determining that the overall structure of the Act is a general rule with "a notably narrow exception," that the facts of the case do not fall under the exception, and that they are thus covered by the general rule); Atl. Richfield Co. v. Christian, 140 S. Ct. 1335, 1364 (2020) (noting the procedural focus of the entire section); Murphy v. Smith, 138 S. Ct. 784, 789 (2018) ("The surrounding statutory structure . . . suggests a statute that seeks to restrain, rather than replicate, the discretion found in § 1988(b).").

160. 139 S. Ct. 1894 (2019).

161. 42 U.S.C. §§ 2011–2297h.

162. *See Va. Uranium*, 139 S. Ct. at 1900 ("Virginia Uranium insists that the federal Atomic Energy Act preempts a state law banning uranium mining, but we do not see it.").

163. *See id.* ("[W]e are hardly free to extend a federal statute to a sphere Congress was well aware of but chose to leave alone. In this, as in any field of

AEA did preempt state law because it reserved "the regulation of uranium mining . . . to the [Nuclear Regulatory Commission (NRC)] alone."[164] The majority first pointed out that "[u]nlike many federal statutes, the AEA contain[ed] no provision preempting state law in so many words."[165] It then turned to the general structure of the broader statutory scheme to support this conclusion.[166] The majority read the statute as first "announcing a general rule that mining regulation lies outside the NRC's jurisdiction," before carving out "a notably narrow exception" that the NRC may regulate uranium mining "[o]n *federal* lands."[167] The opinion went on to discuss several other federal statutes confirming this structure.[168] The majority relied on the general structure of the AEA to conclude that the federal framework did not preempt state law because the facts did not fall within the narrow exception that the statute established.[169]

Likewise, in *Murphy v. Smith*,[170] Justice Gorsuch, again writing for the majority, determined that the "surrounding statutory structure" of the Prison Litigation Reform Act[171] "suggest[ed] that the statute [sought] to restrain" the discretion of the district courts.[172] The question in that case was whether the district court had discretion to vary the portion of attorney's fees that a prisoner-plaintiff who had prevailed in a § 1983[173] action must pay before the burden to pay shifts to the defendant.[174] The statute stated that "a portion of the

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statutory interpretation, it is our duty to respect not only what Congress wrote but, as importantly, what it didn't write.").

164. *See id.* at 1901 (explaining the company's argument).

165. *See id.* at 1902 ("Even more pointedly, the statute grants the NRC extensive and sometimes exclusive authority to regulate nearly every aspect of the nuclear fuel life cycle *except* mining.").

166. *See id.* ("What the text states, context confirms.").

167. *See id.* (describing the structure set forth in 42 U.S.C. § 2097).

168. *See id.* (discussing §§ 2021, 2096).

169. *See id.* at 1900 ("But Congress conspicuously chose to leave untouched the States' historic authority over the regulation of mining activities on private lands within their borders.").

170. 138 S. Ct. 784 (2018).

171. 42 U.S.C. § 1997e.

172. *Murphy*, 138 S. Ct. at 789.

173. 42 U.S.C. § 1983.

174. *See Murphy*, 138 S. Ct. at 786 (describing the statutory interpretation dispute in the case).

[plaintiff's] judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant . . . . [T]he excess shall be paid by the defendant."[175] The defendants maintained that the "court had to take 25% . . . from [the plaintiff's] judgment before taxing [the defendants] for the balance of the fee award."[176] But the trial court only required the plaintiff to pay 10 percent of the judgment before holding "the defendants responsible for the rest."[177] In overturning the district court's fee allocation, Justice Gorsuch relied on the fact that "the other provisions of § 1997e(d) *also* limit the district court's pre-existing discretion."[178] He found the discretion-restricting nature of the rest of § 1997e(d) to be evidence of the fact that the language at issue served to restrain the district court's discretion.[179] This example demonstrates that statutory structure is relevant to a muscular textualist analysis, while the interpreter should generally disregard specific language in other sections.[180]

4. Statutory History Is Significant

In addition to statutory structure, muscular textualists also consider statutory history.[181] Statutory history consists of "the statutes repealed or amended by the statute under

175. § 1997e(d)(2).

176. *Murphy*, 138 S. Ct. at 787.

177. *Id.*

178. *Id.* at 789.

179. *See id.* (discussing the statutory structure).

180. *See supra* Part II.B.2.

181. *See* WesternGeco LLC v. ION Geophysical Corp., 138 S. Ct. 2129, 2142 (2018) (interpreting a statute that overruled a prior patent infringement case to apply only to the type of infringement at issue in that case); SAS Inst., Inc. v. Iancu, 138 S. Ct. 1348, 1355 (2018) ("Congress's choice to depart from the model of a closely related statute is a choice neither we nor the agency may disregard."); Murphy v. Smith, 138 S. Ct. 784, 789 (2018) ("If Congress had wished to confer the same discretion . . . we very much doubt that it would have bothered to write a new law; omit all the words that afforded discretion in the old law; and then replace those old discretionary words with new mandatory ones."); Niz-Chavez v. Garland, 141 S. Ct. 1474, 1484 (2021) (determining that where the new statute "changed the name of the charging document" and "changed the rules governing the documents contents" the more permissive standard of the old statute could no longer apply).

consideration."[182] It "form[s] part of the context of the statute, and (unlike legislative history) can properly be presumed to have been before all the members of the legislature when they voted. So a change in the language of a prior statute presumably connotes a change in meaning."[183] Though muscular textualism is in some ways stricter than new textualism about what context a court may permissibly consider, it takes new textualism's permissive view about statutory history.[184]

For example, Justice Gorsuch's muscular textualist dissent in *BNSF Railway Co. v. Loos*,[185] joined in full by Justice Thomas, looked to the RRTA's statutory history.[186] In *BNSF Railway*, the Court had to determine whether an employee's damage award for injuries suffered due to the employer's negligence constitutes "taxable 'compensation' for 'services rendered as an employee.'"[187] Justice Gorsuch's dissent noted that an earlier version of the statute "defined taxable 'compensation' to include remuneration 'for services rendered,' but with the further instruction that this *included* compensation 'for time lost.'"[188] In 1975, Congress "removed payments 'for time lost' from the RRTA's definition of 'compensation.'"[189] The dissent considered this to be strong evidence that the statute's language did not embrace the damages at issue.[190] It thus concluded that damages for injury were not taxable compensation within the meaning of the RRTA.[191] As it was in this case, statutory history

182. SCALIA & GARNER, *supra* note 21, at 256 (discussing the reenactment canon).

183. *Id.*

184. *See* BNSF Ry. Co. v. Loos, 139 S. Ct. 893, 906 (2019) (Gorsuch, J., dissenting) (describing statutory history as "the sort of textual evidence everyone agrees can sometimes shed light on meaning").

185. 139 S. Ct. 893 (2019).

186. *See id.* at 907 (Gorsuch, J., dissenting) (discussing the statute's history).

187. *See id.* at 904 (describing the issue before the Court) (quoting 26 U.S.C. § 3231(e)(1)).

188. *Id.* at 907 (citation omitted).

189. *Id.* (citation omitted).

190. *See id.* ("To my mind, Congress's decision to remove the *only* language that could have fairly captured the damages here cannot be easily ignored.").

191. *See id.* at 904 ("When an employee suffers a physical injury due to his employer's negligence and has to sue in court to recover damages, it seems

can be decisive evidence that a construction that aligns with the meaning of old statutory language is not a permissible interpretation of the present text.[192]

Muscular textualism is stricter than new textualism about the subtextual and extratextual context that the interpreter can consider.[193] Social context and specific language in related statutes is hardly given any weight.[194] This characteristic reinforces muscular textualism's literalness and its heavy reliance on contemporaneous dictionaries.[195] But that is not to say that muscular textualism is a closed universe consisting only of the statute at issue and dictionary definitions of its individual terms.[196] Like new textualism, muscular textualism permits the interpreter to consider the general structure of the broader statutory scheme and the statutory history.[197] Further, if the statutory language remains ambiguous after examination of the immediate textual context, the permissible context becomes somewhat broader.[198]

C. *More Context Can Be Considered for Ambiguous Language*

If a muscular textualist concludes that the language is reasonably susceptible to multiple meanings after exhausting the text and context discussed above, she may somewhat broaden her search for meaning. She can do so by giving greater weight to language in other provisions, language in other parts of the same statute, and even some extratextual considerations.[199]

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more natural to me to describe the final judgment as compensation for his injury than for services (never) rendered.").

192. *See supra* Part II.B.2.

193. *See supra* Part II.B.1–2.

194. *See supra* Part II.B.1–2.

195. *See supra* Part II.A.

196. *See supra* Part II.B.3–4.

197. *See supra* Part II.B.3.–4.

198. *See infra* Part II.C.

199. *See* Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media, 140 S. Ct. 1009, 1015 (2020) (discussing causation requirements in other sections where "the statute's text does not expressly discuss causation"); Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1624–25 (2018) (applying the harmonious-reading canon and looking to the broader structure of the NLRA upon finding that one interpretation of the NLRA conflicts with the FAA while another is

Where the language itself is ambiguous after the muscular textualist has consulted contemporaneous dictionaries, statutory structure, and statutory history, she may give significant weight to specific language in the same or related statutes.[200] In *Comcast Corp. v. National Association of African American-Owned Media*,[201] the parties disagreed over the causation standard in a § 1981[202] claim.[203] Justice Gorsuch, writing for the majority, first found that "the statute's text [did] not expressly discuss causation," though it was "suggestive."[204] He then turned to other sections of the Civil Rights Act of 1866[205] for guidance.[206] In concluding that § 1981 required traditional but-for causation, Justice Gorsuch relied on the fact that "a neighboring section" required that same causation standard.[207] Because he had first concluded that the statutory language was ambiguous, his analysis placed more weight on the specific language in a related section than it otherwise would have.[208]

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reconcilable with it); Artis v. District of Columbia, 138 S. Ct. 594, 610 (2018) (Gorsuch, J., dissenting) (looking to use of the same term later in the sentence).

200. *See* United States v. Davis, 139 S. Ct. 2319, 2328–39 (2019) (relying heavily on the statute's prefatory language and related statutes after concluding that "'in ordinary speech,' this word can carry at least two possible meanings"); HollyFrontier Cheyenne Refin., LLC v. Renewable Fuels Ass'n., 141 S. Ct. 2172, 2176–77 (2021) (relying on the temporal limitation in other subsections where the "key word" was "nowhere defined in the statute and . . . can mean different things depending on context").

201. 140 S. Ct. 1009 (2020).

202. 42 U.S.C. § 1981.

203. *See Comcast Corp.*, 140 S. Ct. at 1013 (explaining the plaintiff's contention that § 1981 departs from the traditional "but for" causation requirement).

204. *Id.* at 1015.

205. Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1870).

206. *See Comcast Corp.*, 140 S. Ct. at 1016 ("In light of the causation standard Congress specified for the cause of action it expressly endorsed, it would be more than a little incongruous for us to employ the laxer rules [the plaintiff] proposes for this Court's judicially implied cause of action.").

207. *See id.* at 1015 ("To prove a violation . . . [under § 1982] the government had to show that the defendant's challenged actions were taken 'on account of' or 'by reason of' race—terms we have often held indicate a but-for causation requirement." (internal quotation marks and citation omitted)).

208. *See supra* Part II.B.2.

Ambiguous language may also permit a muscular textualist to rely on extratextual considerations to some extent.[209] In *Epic Systems Corp. v. Lewis*,[210] the Court had to determine whether the National Labor Relations Act (NLRA)[211] permitted employees to contract away their right to collective arbitration.[212] If so, the NLRA conflicted with the Federal Arbitration Act (FAA).[213] The majority found that the NLRA "sa[id] nothing about how judges and arbitrators must try legal disputes that leave the workplace and enter the courtroom or arbitral forum."[214] In light of this ambiguity, the majority turned to the harmonious-reading canon, which provides that "the provisions of a text should be interpreted in a way that renders them compatible, not contradictory."[215] Per the harmonious-reading canon, the majority's muscular textualist analysis adopted the interpretation of the NLRA that does not conflict with the FAA.[216] In so doing, it gave more weight to the extratextual considerations inherent in the harmonious-reading canon than it would have if it had not first determined that the language was ambiguous.[217]

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209. Common law analogues are also a common source of extratextual consideration if the statute is ambiguous. *See, e.g.*, Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931, 1941–42 (2021) (Gorsuch, J., concurring) (looking to common law tort suits where nothing in the Alien Tort Statute indicated whether the defendant could be a corporation). A complete analysis of the use of common law analogues requires consideration of how common law analogues are used in constitutional interpretation and is therefore beyond the scope of this Note.

210. 138 S. Ct. 1612 (2018).

211. 29 U.S.C. §§ 151–166.

212. *See Epic Sys. Corp.*, 138 S. Ct. at 1619 (stating the issue before the Court).

213. 9 U.S.C. §§ 1–14; *see Epic Sys. Corp.*, 138 S. Ct. at 1620–21 (explaining the potential conflict between the two Acts).

214. *Epic Sys. Corp.*, 138 S. Ct. at 1619.

215. SCALIA & GARNER, *supra* note 21, at 180; *see Epic Sys. Corp.*, 138 S. Ct. at 1624 ("When confronted with two Acts of Congress allegedly touching on the same topic, this Court is not at 'liberty to pick and choose among congressional enactments' and must instead strive 'to give effect to both.'" (quoting Morton v. Mancari, 417 U.S. 535, 551 (1974))).

216. *See Epic Sys. Corp.*, 138 S. Ct. at 1632 (concluding that the two statutes do not conflict).

217. *See* United States v. Davis, 139 S. Ct. 2319, 2332 (2019)

> [W]hen presented with two "fair alternatives," this Court has sometimes adopted the *narrower* construction of a criminal statute to avoid having to hold it unconstitutional if it were construed more

As the cases discussed above show, muscular textualism does not follow the same interpretive steps as new textualism.[218] In some instances, muscular textualism will lead the interpreter to adopt a different interpretation than she would if she were applying a new textualist analysis.[219] In *Bostock*, the result was a victory for individual rights advocates.[220] But this will not always be the case.[221] To better understand muscular textualism's potential consequences, it is helpful to apply the analysis to several specific individual rights disputes.

III. APPLYING MUSCULAR TEXTUALISM

This Part applies muscular textualism to two interpretive issues that have created a circuit split. As outlined above, a muscular textualist begins with the contemporaneous dictionary definitions of the terms in the statute.[222] Next, she confirms the meaning derived from the definitions of the terms against the statute's general structure and statutory history.[223] In so doing, she does not give social context and societal understandings of the language at the time of enactment any weight.[224] If she cannot give the statute a clear meaning based on this context, the muscular textualist may then give weight to other statutory language and even some extratextual considerations.[225]

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broadly. But no one before us as identified a case in which this Court has invoked the canon to *expand* the reach of a criminal statute in order to save it. (internal citations omitted).

218. *See* cases discussed *supra* Part II.A–C and accompanying text.

219. *See* Grove, *supra* note 8, at 265–67 (explaining that there are differing strands of textualism).

220. *See, e.g.*, Totenberg, *supra* note 3 ("The [*Bostock*] decision is a huge victory for the LGBTQ community . . . .").

221. *See, e.g.*, Prost v. Anderson, 636 F.3d 578, 579–80 (10th Cir. 2011) (finding that the defendant had no right to appeal his sentence even though the United States Supreme Court had reinterpreted the statute under which the defendant had been convicted such that he might not have been convicted at all if tried under the new interpretation).

222. *See supra* notes 76–89 and accompanying text.

223. *See supra* Part II.B.3–4.

224. *See supra* Part II.B.1.

225. *See supra* Part II.C.

First, this Part examines whether Section 2 of the Voting Rights Act[226] prohibits restrictive voter ID laws by methodically applying the muscular textualist analysis.[227] It then turns to Title III of the Americans with Disabilities Act,[228] asking whether plasma centers are subject to compliance with Title III.[229] Rather than working through the framework, as in Part III.A, this analysis points out specific interpretive moves the Third, Fifth, and Tenth Circuit courts made and explains how a muscular textualist's analysis would differ.[230]

A. *Section 2 of the Voting Rights Act Does Not Prohibit Restrictive Voter ID Laws*

Section 2 of the Voting Rights Act prohibits every "qualification or prerequisite to voting or standard, practice, or procedure . . . which results in a denial or abridgement of the right . . . to vote on account of race."[231] It further specifies that the vote is denied or abridged "only where 'the political processes leading to nomination or election' are not '*equally open* to participation' by members of the relevant protected group '*in that its members have less opportunity* than other members of the electorate to participate in the political process and to elect representatives of their choice.'"[232] Several circuits have considered challenges to restrictive voter ID laws on grounds that they violate Section 2.[233] The Fifth Circuit struck down Texas's voter ID law because it "acted in concert with current

226. 52 U.S.C. §§ 10301–10314.

227. *See infra* Part III.A.

228. 42 U.S.C. §§ 12181–12189.

229. *See infra* Part III.B.

230. *See infra* Part III.A–B.

231. 52 U.S.C. § 10301(a).

232. Brnovich v. Dem. Nat'l Comm., 141 S. Ct. 2321, 2337 (2021) (quoting 52 U.S.C. § 10301(b)).

233. *See generally* Gonzalez v. Arizona, 677 F.3d 383 (9th Cir. 2012) (considering a challenge to Arizona's voter ID law); Frank v. Walker, 768 F.3d 744 (7th Cir. 2014) (considering a challenge to Wisconsin's voter ID law); Veasey v. Abbott, 830 F.3d 216 (5th Cir. 2016) (considering a challenge to Texas' voter ID law); Lee v. Va. State Bd. of Elections, 843 F.3d 592 (4th Cir. 2016) (considering a challenge to Virginia's voter ID law); Greater Birmingham Ministries v. Sec'y of State., 966 F.3d 1202 (11th Cir. 2020) (considering a challenge to Alabama's voter ID law).

and historical conditions of discrimination" to violate Section 2.[234] The Seventh Circuit upheld Wisconsin's voter ID law and further opined that voter ID laws cannot violate Section 2 because the resulting racial disparity in voter qualification is not "on account of *race*" but on account of other current socioeconomic disparities that are the result of past discrimination.[235] The Fourth and Ninth Circuits did not reach this issue because they upheld the voter ID laws on narrow, fact-specific grounds.[236] The Eleventh Circuit upheld Alabama's law and echoed the Seventh Circuit's doubt as to whether the Voting Rights Act applies to such suits at all.[237] The circuits agree that plaintiffs must satisfy two elements to succeed on a Section 2 claim: (1) "the challenged law has to 'result in' the denial or abridgement of the right to vote";[238] and (2) "the denial or abridgement of the right to vote must be 'on account of race.'"[239] But there is disagreement as to what these two elements entail.

Until 2021, the Supreme Court had only applied Section 2 to "vote dilution" claims.[240] On the last day of the October 2020 term, it handed down the opinion in *Brnovich v. Democratic National Committee*,[241] reinterpreting Section 2 for rules that

234. *See* Veasey v. Abbott, 830 F.3d 216, 264 (5th Cir. 2016) (striking down Texas's voter ID law on grounds that it "ha[d] a discriminatory effect on minorities' voting rights in violation of Section 2 of the Voting Rights Act").

235. *See* Frank v. Walker, 768 F.3d 744, 753 (7th Cir. 2014) ("[U]nits of government are responsible for their own discrimination but not for rectifying the effects of other person's discrimination.").

236. *See* Lee v. Va. State Bd. of Elections, 843 F.3d 592, 601 (4th Cir. 2016) ("[W]here, as here, Virginia allows everyone to vote and provides free photo IDs to persons without them, we conclude that SB 1256 . . . does not violate § 2 of the Voting Rights Act."); Gonzalez v. Arizona, 677 F.3d 383, 442 (9th Cir. 2012) (Berzon, J., concurring) ("[T]he court holds only that the *current record* is insufficient to show [a violation of Section 2] . . . . A different record in a future case could produce a different outcome . . . .").

237. *See* Greater Birmingham Ministries v. Sec'y of State., 966 F.3d 1202, 1234 (11th Cir. 2020) (citing the Seventh Circuit's opinion with approval).

238. *Id.* at 1233.

239. *Id.*; *see id.* at 1233–34 (stating the tests applied by the various circuits).

240. *See Brnovich*, 141 S. Ct. at 2336 (explaining that the case represents the Court's "first foray into the area of" vote denial claims).

241. 141 S. Ct. 2321 (2021).

"specify the time, place, or manner for casting ballots."[242] This opinion, written by Justice Samuel Alito, was decided after the circuit cases above applied Section 2 to voter ID requirements. It provides new guidance, but it does not fully resolve the disagreement between the circuits for two reasons. First, the majority in *Brnovich* noted, "[B]ecause this is our first § 2 time, place, or manner case, a fresh look at the statutory text is appropriate."[243] But voter ID requirements are a prerequisite to voting, not regulation of the "time, place, or manner" in which voters must cast their ballots. Thus, a future "prerequisite" case should likewise require "a fresh look at the statutory text."[244] The court also only identified "certain guideposts" for its decision rather than "announc[ing] a test to govern all" Section 2 claims.[245] Therefore, lower courts must continue to look to the statute itself for guidance, not just Supreme Court precedent.

Second, the Court upheld the Arizona voting law at issue in *Brnovich* on the first prong of the Section 2 inquiry: whether the law denied or abridged the right of minority voters to cast their ballots.[246] Because it held that the law did not "result in" racially disparate vote denial or abridgement, it did not reach the secondary question of whether denial or abridgement occurred "on account of race," nor did it address the proper considerations for that inquiry.[247]

1. Denial or Abridgement of the Right to Vote

The Circuits applied different standards to determine whether the Section 2 plaintiffs' right to vote had been denied or abridged. In striking down the Texas law, the Fifth Circuit relied on the trial court's finding that a disparate number of minority voters lack the proper ID.[248] It then determined that

242. *Id.* at 2336.

243. *Id.* at 2337.

244. *Id.*

245. *Id.* at 2336.

246. *See id.* at 2348 (concluding that "the modest evidence of racially disparate burdens caused by [the law], in light of the State's justifications, leads us to the conclusion that the law does not violate § 2 of the VRA").

247. *Cf.* 52 U.S.C. § 10301(a).

248. *See* Veasey v. Abbott, 830 F.3d 216, 250 (5th Cir. 2016) (stating the evidence in support of the district court's findings).

this was sufficient evidence of abridgement of the right to vote.[249] Conversely, the Seventh Circuit determined that this "disparate outcome" did not "show a 'denial' of anything by Wisconsin . . . unless Wisconsin makes it *needlessly* hard to get photo ID."[250] The first interpretive question then is: what constitutes "denial or abridgement" of the right to vote?

In *Brnovich* the Court announced that Section 2(b) "explains what must be shown to establish" denial or abridgement:[251]

> [T]he core of § 2(b) is the requirement that voting be "equally open." The statute's reference to equal "opportunity" [to participate in the political process] may stretch the concept to some degree to include consideration of a person's ability to *use* the means that are open. But equal openness remains the touchstone.[252]

It further noted that "[t]he provision requires consideration of the totality of [the] circumstances," and went on to compile a non-exhaustive list of factors that lower courts might consider.[253] Because these factors are not grounded in the text,

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249. *See id.* at 260 (stating that "the district court's finding that" the law causes "a racial disparity in voter ID possession falls comfortably within" the definition of abridgement).

250. Frank v. Walker, 768 F.3d 744, 753 (7th Cir. 2014). The Fourth and Eleventh Circuits made the same point. *See* Lee v. Va. State Bd. of Elections, 843 F.3d 592, 601 (4th Cir. 2016) ("If Virginia had required voters to present identifications without accommodating citizens who lacked them, the rule might arguably deprive some voters of an equal opportunity to vote."); Greater Birmingham Ministries v. Sec'y of State, 966 F.3d 1202, 1233 (11th Cir. 2020) ("Even though minority voters in Alabama are slightly more likely than white voters not to have compliant IDs, the plain language of Section 2 requires more.").

251. Brnovich v. Dem. Nat'l Comm., 141 S. Ct. 2321, 2337 (2021).

252. *Id.*

253. *Id.* at 2338–40. The factors the *Brnovich* majority lists are entirely extrastatutory. *See id.* at 2362 (Kagan, J., dissenting) (describing the majority's test as "a list of mostly made-up factors, at odds with Section 2 itself" and "a set of extra-textual restrictions on Section 2—methods of counteracting the law Congress actually drafted to achieve the purposes *Congress* though 'important'"). Nowhere in the text of Section 2 is there any indication that "the degree to which a voting rule departs from what was standard practice when § 2 was amended in 1982" or "the strength of the state interests served by a challenged voting rule" can or should inform the inquiry. *Id.* at 2338–39, 2339–40 (majority opinion). The Court's reliance on the extent

a muscular textualist would likely reject their application.[254] Instead she would accept the *Brnovich* Court's directive that the central consideration must be whether the political process is "equally open," and would additionally look to the literal meaning of "denial" and "abridgement."[255] "Denial" means "[a] deprivation,"[256] or "a refusal to comply or satisfy."[257] Based on the test announced in *Brnovich*, this requires the plaintiff to show that the political process is not "equally open" in that some voters did not have the same opportunity to obtain a photo ID.[258] A law can also violate Section 2 if it "results in . . . abridgement of the right . . . to vote."[259] "Abridgement" means "condensation,

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to which the rule departs from standard practice in 1982 is particularly perplexing, because if Congress had not perceived problematic voting rules in 1982 it is doubtful that it would have thought it necessary to amend Section 2. *See infra* Part III.A.4; *Brnovich*, 141 S. Ct. at 2354 (Kagan, J., dissenting) (stating that the majority acted "as though the Voting Rights Act no longer has a problem to address—as though once literacy tests and poll taxes disappeared, so too did efforts to curb minority voting"); *id.* at 2363–64 ("Section 2 was meant to disrupt the status quo, not to preserve it—to eradicate then-current discriminatory practices, not to set them in amber."). The dissent rests on Section 2's command that "the totality of circumstances" has "bearing on whether a State makes voting 'equally open' to all," and thus grudgingly accepts the *Gingles* factors, which are derived from the 1986 vote denial case *Thornburg v. Gingles*, 478 U.S. 30 (1986). *Brnovich*, 141 S. Ct. at 2335–36, 2341 (majority opinion). It nonetheless contemptuously decried the dissent's discussion of several factors that, according to Justice Alito, "have little bearing on the question" before the Court, such as the Supreme Court's 2013 decision in *Shelby County v. Holder*, 570 U.S. 529 (2013), "voting rules that are not at issue," and "points of law that nobody disputes," but the majority nonetheless refused to recognize. *Brnovich*, 141 S. Ct. at 2341.

254. For this reason, it is surprising that Justice Gorsuch joined the opinion in full and did not even mention the lack of a textual basis for the majority's test in his short, one-paragraph concurrence. *See Brnovich*, 141 S. Ct. at 2350 (Gorsuch, J., concurring).

255. *See supra* Part II.A.

256. *Denial*, BLACK'S LAW DICTIONARY (4th ed. 1951).

257. *Denial*, THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (1969); *see Denial*, BRITANNICA WORLD LANGUAGE DICTIONARY (1960) (defining "denial" as a "rejection" and "[r]efusal to grant, indulge, or agree"); *Denial*, RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (1966) (defining "denial" as "the refusal of or the refusal to satisfy a claim, request, desire, etc.," and "refusal to recognize or acknowledge").

258. *See Brnovich*, 141 S. Ct. at 2341 (majority opinion) (stating that courts must consider "whether a state makes voting 'equally open' to all and gives everyone an equal 'opportunity' to vote").

259. 52 U.S.C. § 10301(a).

contraction"[260] or "curtailment."[261] As the *Brnovich* Court conceded, "[A]n 'abridgement' of the right to vote under § 2 does not require outright denial of the right."[262] But, citing *Crawford v. Marion County Election Board*,[263] it averred that "every voting rule imposes a burden of some sort" and that "[m]ere inconvenience cannot be enough to demonstrate a violation of § 2."[264] In *Crawford*, the Supreme Court noted that "the inconvenience of making a trip to the [DMV], gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting."[265] Though *Crawford* is not controlling because it involved a constitutional, rather than a statutory, challenge to the voter ID law, the Court's prior determination as to the substantiality of the burden on the voter and the state's interests is "elevated . . . to a status of legislative fact" and deserves deference.[266]

Based on this context, the literal meaning of the statutory language is not ambiguous. The first element of a Section 2 claim requires, at minimum, a showing that the law imposes a discriminatory burden on the ability to vote. At least for the small class of voters who cannot obtain proper identification, voter ID laws result in abridgement of the right to vote. Under *Brnovich*, the plaintiff also retains the burden of proving that the voting restriction imposes a meaningful burden; that the

260. *Abridgement*, BLACK'S LAW DICTIONARY (4th ed. 1951).

261. *See Abridgement*, AMERICAN HERITAGE DICTIONARY (1969) (defining "abridgement" as "the state of being abridged" and "abridge" as "to curtail, cut short"); *Abridgement*, BRITANNICA WORLD LANGUAGE DICTIONARY (1960) (defining "abridgement" as "the state of being abridged" and "abridge" as "to curtail or lessen, as rights"); *Abridgement*, RANDOM HOUSE DICTIONARY (1966) (defining "abridgement" as "the state of being abridged" and "abridge" as "to reduce or lessen in duration, scope, etc.; diminish; curtail").

262. Brnovich v. Dem. Nat'l Comm., 141 S. Ct. 2321, 2341 (2021); *see id.* at 2357 (Kagan, J., dissenting) ("[A]bridgement necessarily means something more subtle and less drastic than the complete denial of the right to cast a ballot, denial being separately forbidden." (alteration in original) (internal quotation omitted)).

263. 553 U.S. 181 (2008).

264. *Brnovich*, 141 S. Ct. at 2338 (majority opinion).

265. *Crawford*, 553 U.S. at 198.

266. Veasey v. Abbott, 830 F.3d 216, 314 (5th Cir. 2016) (Jones, J., dissenting).

rule "departs from what was standard practice when § 2 was amended in 1982"; that the racial disparity is sufficiently large; whether voters had alternative means to vote; and "the strength of the state interests served by a challenged voting rule."[267]

Even that is not the end of the matter: "a § 2 challenge based purely on a showing of some relevant statistical disparity between minorities and whites, without any evidence that the challenged voting qualification causes that disparity, will be rejected."[268] Section 2 also requires evidence of a causal connection between the voting qualification's denial of the right to vote and the prospective voter's race.[269] The *Brnovich* Court did not find a meaningful disparity, and thus did not reach this prong of the inquiry. But in the ever-smaller number of cases in which plaintiffs can make the showing of "denial or abridgement" required by *Brnovich*, a muscular textualist will also require a showing of causation.

2. The Causation Standard

In the absence of a clear directive from the Supreme Court, there is much confusion about Section 2's causation standard. The Fifth Circuit majority applied a multi-factor test derived from the Supreme Court's opinion in *Thornburg v. Gingles*[270] to provide "the requisite causal link between the burden on voting rights and the fact that this burden affects minorities disparately because it interacts with social and historical conditions that have produced discrimination against minorities currently, in the past, or both."[271] Under this approach, the court must look to the "*Gingles* factors" after it finds a disparate impact.[272] If the *Gingles* factors indicate a historic burden on

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267. *Brnovich*, 141 S. Ct. at 2338–40.

268. Gonzalez v. Arizona, 677 F.3d 383, 405 (9th Cir. 2012) (internal quotation omitted).

269. *See infra* Part III.A.2.

270. 478 U.S. 30 (1986).

271. *Veasey*, 830 F.3d at 245 (majority opinion).

272. *See id.*

> These factors include:
> 1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;

minorities and a threat of disenfranchisement, then the election regulation must be struck down.[273] The problem with this analysis is that, practically speaking, the state's history of discrimination is often determinative. Since historical racial discrimination is ubiquitous in the United States, once the plaintiff has shown a disparate impact, "the causal analysis becomes a mere formality" under this approach.[274] The Fifth Circuit's dissent and the Eleventh Circuit majority forcefully rejected application of the "extra-statutory *Gingles* factors."[275] Because the plain language of the statute sets out the applicable causation standard, muscular textualism also requires repudiation of the *Gingles* factors.

Section 2 prohibits laws that result in denial or abridgement of the right to vote "on account of race."[276] "On

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> 2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
> 3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
> 4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
> 5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
> 6. whether political campaigns have been characterized by overt or subtle racial appeals;
> 7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

273. *Id.*

274. Megan Larrondo & Robert Barry, *The Voting Rights Act Isn't a Moving Target, But the 9th Circuit's Test Would Turn It Into One*, SCOTUSBLOG (Feb. 23, 2021, 10:47 AM), https://perma.cc/2SSM-MAM9.

275. *Veasey*, 830 F.3d at 306 (Jones, J., dissenting); *see id.* at 304 ("The majority's errors lead it to depart from the statute's text, resulting in the adoption of non-textual and irrelevant 'factors' that, in practice, amount to little more than a naked disparate impact test."); Greater Birmingham Ministries v. Sec'y of State, 966 F.3d 1202, 1235 (11th Cir. 2020) ("[W]e question the applicability of *Gingles* to this case. *Gingles* was a vote dilution case and this case involves vote denial, a fundamentally different claim . . . . How, then, can we apply the factors to this case? The obvious answer is that we cannot.").

276. 52 U.S.C. § 10301(a).

account of" means "by reason of" or "because of."[277] This language "incorporates the 'simple' and 'traditional' standard of but-for causation."[278] Accordingly, to succeed on a Section 2 claim, plaintiffs must show that, "but for" their race, their vote would not have been denied or abridged.[279]

3. The Meaning of "Race"

If a muscular textualist is to determine whether denial or abridgement occurred "on account of race," he must first define the operative term "race." The Fifth Circuit struck down Texas's voter ID law because it interacted with "social and historical conditions of discrimination such that the abridgement [occurred] 'on account of race.'"[280] A muscular textualist would not agree that this constitutes a violation of Section 2 because the abridgement did not occur "on account of race."[281] If "a black voter and a white voter of equal means who each lack ID and a birth certificate, and who each live an equal distance away from the registrar's office" bear the same burden and must follow the same procedure to get the proper ID, the requirement does not

277. *See* Bostock v. Clayton County, 140 S. Ct. 1731, 1739 (2020) ("[A]s this Court has previously explained, 'the ordinary meaning of "because of" is "by reason of" or "on account of."'" (quoting Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 350 (2013))).

278. *Id.* (some internal quotation marks omitted) (quoting Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 346 (2013)); *see* Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media, 140 S. Ct. 1009, 1015 (2020) ("To prove a violation, then, the government had to show that the defendant's challenged actions were taken '"on account of"' or '"by reason of"' race—terms we have often held indicate a but-for causation requirement." (quoting Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 176–77 (2009) (Thomas, J.))). Notably, Justice Gorsuch does not turn to the dictionary to interpret causation standards. As he explains in *Comcast*, this is because the "ancient and simple 'but for' common law causation test . . . supplies the 'default' or 'background' rule against which Congress is normally presumed to have legislated when creating its own new causes of action." *See Comcast Corp.*, 140 S. Ct. at 1014.

279. *See Bostock*, 140 S. Ct. at 1739 ("[But-for] causation is established whenever a particular outcome would not have happened "but for" the purported cause. In other words, a but-for test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause.").

280. Veasey v. Abbott, 830 F.3d 216, 253 (5th Cir. 2016).

281. 52 U.S.C. § 10301(a).

abridge voting on account of *race*.[282] "Race" means "[a] local geographic or global human population distinguished as a more or less distinct group by genetically transmitted physical characteristics," or "any group of people united or classified together on the basis of common history, nationality, or geographical distribution."[283] Under a muscular textualist analysis, "social and historical conditions of discrimination" do not fall within the literal definition of "race."[284]

The Seventh Circuit recognized this and stated that Section 2 "forbids discrimination by 'race or color' but does not require states to overcome societal effects of private discrimination that affect the income or wealth of potential voters."[285] The Fifth Circuit sought to distinguish its case by

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282. *Greater Birmingham Ministries*, 966 F.3d at 1232 (internal quotation omitted). *Compare* Brnovich v. Dem. Nat'l Comm., 141 S. Ct. 2321, 2339 (2021)

> To the extent that minority and non-minority groups differ with respect to employment, wealth, and education, even neutral regulations, no matter how crafted, may well result in some predictable disparities in rates of voting and noncompliance with voting rules. But the mere fact there is some disparity in impact does not necessarily mean that a system is not equally open or that it does not give everyone an equal opportunity to vote.

with id. at 2363 (Kagan, J., dissenting) ("The drafters of the Voting Rights Act understood that 'social and historical conditions' including disparities in education, wealth, and employment, often affect opportunities to vote.").

283. *Race*, THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (1969); *see Race,* BLACK'S LAW DICTIONARY (4th ed. 1951) (defining "race" as "a great division of mankind having in common certain distinguishing physical peculiarities constituting a comprehensive class appearing to be derived from a distinct primitive source"); *Race*, RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (1966) (defining "race" as "a group of persons related by common descent, blood, or heredity" and "a population so related"); *Race*, BRITANNICA WORLD LANGUAGE DICTIONARY (1960) (defining "race" as "[a]ny class of beings having characteristics uniting them, or differentiating them from others").

284. *See Veasey*, 830 F.3d at 261 ("[T]he impact of past and current discrimination on minorities in Texas favors finding that SB 14 has a discriminatory effect under Section 2.").

285. Frank v. Walker, 768 F.3d 744, 753 (7th Cir. 2014); *see Brnovich*, 141 S. Ct. at 2339 (majority opinion)

> To the extent that minority and non-minority groups differ with respect to employment, wealth, and education, even neutral regulations, no matter how crafted, may well result in some predictable disparities in rates of voting and noncompliance with voting rules. But the mere fact that there is some disparity in

pointing to "the lasting effects of [Texas's] State-sponsored discrimination."[286] But Wisconsin, like Texas, has a long history of "State-sponsored discrimination."[287] As the Seventh Circuit noted, the but-for cause of the disparity in voter eligibility is the disparity "in economic circumstances" between white and minority voters, not their race.[288]

Though new textualists might permit a somewhat broader view of what it means to deny or abridge the right to vote on account of race, muscular textualism does not.[289] In *Bostock*, the dissent criticized the majority for its expansive view of the meaning of "sex" in Title VII.[290] But the majority's definition of "sex" was not broader or more "progressive" than that of the dissent. Contrary to the dissent's accusation, the majority did not hold that "sexual orientation" falls within the definition of "sex."[291] Rather, it merely held that on the facts presented, the defendants had discriminated on account of sex.[292] In the context of Section 2, a muscular textualist would not conclude that past racial discrimination is the same thing as race.

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impact does not necessarily mean that a system is not equally open or that it does not give everyone an equal opportunity to vote.

286. *Veasey*, 830 F.3d at 248.

287. *Id.*; *cf.* Marc V. Levine, *The State of Black Milwaukee in National Perspective: Racial Inequality in the Nation's 50 Largest Metropolitan Areas. In 65 Charts and Tables*, CTR. FOR ECON. DEV. 10–18 (2020), https://perma.cc/8KHJ-FK3F (PDF) (examining residential segregation in Milwaukee).

288. *See Walker*, 768 F.3d at 753 (discussing the relationship between race, poverty, and possession of the proper voter ID).

289. *See* Chisom v. Roemer, 501 U.S. 380, 408 (1991) (Scalia, J., dissenting) (stating "[i]f, for example, a county permitted voter registration for only three hours one day a week, and that made it more difficult for blacks to register than whites" Section 2 would "be violated").

290. *See* Bostock v. Clayton County, 140 S. Ct. 1731, 1755 (2020) (Alito, J., dissenting) ("The Court tries to convince readers that it is merely enforcing the terms of the statute, but that is preposterous. Even as understood today, the concept of discrimination because of 'sex' is different from discrimination because of 'sexual orientation' or 'gender identity.'").

291. *See* Transcript of Oral Argument at 68, *Bostock*, 140 S. Ct. 1731 (2020) (No. 17-1618) ("No one has claimed that sexual orientation is the same thing as sex.").

292. *See id.*

4. Statutory History

Section 2's statutory history does not alter the muscular textualist construction of the statute. In *Mobile v. Bolden*,[293] the Supreme Court held that plaintiffs had to prove discriminatory intent to succeed on a Section 2 claim.[294] Less than a year after *Bolden* was handed down, Congress introduced, and later passed, a bill to amend the statute to clarify that the burden of proof in a Section 2 claim is lower than in a corresponding constitutional claim.[295] The purpose of the amendment was "to repudiate *Bolden* and establish a new vote-dilution test."[296] Perhaps this history counsels toward a somewhat more permissive view of what evidence is sufficient to show "denial or abridgement of the right to vote."[297] But for a muscular textualist, the statutory history cannot outweigh the fact that vote abridgement must occur "on account of *race*."[298]

Based on a muscular textualist interpretation of Section 2, a plaintiff seeking to challenge a voter ID law must prove that the right of minority voters to vote has been disparately denied or abridged.[299] He must also prove that but for their race,

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293. 446 U.S. 55 (1980).

294. *See id.* at 60–62 ("[T]he sparse legislative history of § 2 makes clear that it was intended to have an effect no different from that of the Fifteenth Amendment itself . . . . The Court's more recent decisions confirm the principle that racially discriminatory motivation is a necessary ingredient of a Fifteenth Amendment violation.").

295. Brnovich v. Dem. Nat'l Comm., 141 S. Ct. 2321, 2332 (2021); *see id.* at 2351 (Kagan, J., dissenting) (stating that the amendment "became necessary when [the] Court construed the statute too narrowly"); Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689, 704–05 (2006) (discussing Section 2's statutory history).

296. *Brnovich*, 141 S. Ct. at 2332 (majority opinion).

297. *See* Veasey v. Abbott, 830 F.3d 216, 243 (2016) ("Unlike discrimination claims brought pursuant to the Fourteenth Amendment, Congress has clarified that violations of Section 2(a) can 'be proved by showing discriminatory effect alone.'" (quoting Thornburg v. Gingles, 478 U.S. 30, 35 (1986))).

298. 52 U.S.C. § 10301(a) (emphasis added).

299. A plaintiff seeking to vindicate his right to vote by filing suit under Section 2 may face another hurdle. In a short, one-paragraph concurrence in *Brnovich*, Justice Gorsuch, joined by Justice Thomas, stated that Section 2 may not even "furnish an implied cause of action," but nonetheless joined the Court's opinion in full because "no party argues that the plaintiffs lack a cause of action here." *Brnovich*, 141 S. Ct. at 2350 (Gorsuch, J., concurring).

leaving all socio-economic circumstances the same and ignoring the lasting effects of centuries of discrimination, the denial or abridgement would not have occurred.[300] This is a steep undertaking. In light of continuing, persistent disenfranchisement of minority voters,[301] this restrictive reading of our "Nation's signal piece of civil-rights legislation"[302] undermines the Act's promise "to secure to all our polity equal citizenship stature, a voice in our democracy undiluted by race."[303] Though muscular textualism gives an extremely restrictive meaning to Section 2, it will not do so for every statute, as the analysis of the Americans with Disabilities Act below demonstrates.[304] The fact that muscular textualism gives a narrow rights-restrictive meaning to some statutes, while giving a broader rights-protective meaning to others, rebuts the allegation that muscular textualism is results-oriented.[305]

B. *Title III of the ADA Applies to Plasma Centers*

Unlike the muscular textualist analysis of Section 2 outlined above, muscular textualism would likely not give a narrow, rights-restrictive construction to the term "service-establishment" in Title III of the Americans with Disabilities Act. Title III prohibits discrimination "on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations . . . by any person who owns, leases (or leases

300. *See supra* notes 231–288 and accompanying text.

301. *See* Christian Hosam, *The Supreme Court's Long War Against Voting Rights*, WASH. POST (June 15, 2018, 6:00 AM), https://perma.cc/8GB3-2ZR3 ("White lawmakers will write laws and create administrative practices that, on their face, are racially neutral but that have the effect of excluding minority voters from exercising their constitutional rights.").

302. Shelby County v. Holder, 570 U.S. 529, 580 (2013) (Ginsburg, J., dissenting).

303. *Id.* at 592.

304. *See infra* Part III.B.

305. *Cf.* Letter from the Leadership Conference on Civil and Human Rights to Chuck Grassley, Chairman, U.S. Senate Judiciary Comm. (Mar. 20, 2017), https://perma.cc/PE6P-W9TR (PDF) ("[Justice] Gorsuch has demonstrated in his opinions and writings that he is results-oriented and would be highly unlikely to show independence from a President who shares his ideological agenda.").

to), or operates a place of public accommodation."[306] The statute defines "public accommodations," in relevant part, to include "a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or *other service establishment*."[307]

In *Levorsen v. Octapharma Plasma, Inc.*,[308] the Tenth Circuit had to determine whether plasma centers are subject to Title III.[309] A plasma center is a facility where donors can donate blood plasma.[310] Before donating, donors must undergo a health screening process.[311] The plasma center pays donors for their plasma and subsequently sells the plasma to pharmaceutical companies.[312] Plasma centers are not among the specifically enumerated public accommodations in § 12181(7)(F), but the plaintiff in *Levorsen* alleged that the plasma center fell under the catchall term "other service establishment."[313] The defendant plasma center disagreed because plasma centers "don't provide a service to the public in exchange for a fee."[314] Relying heavily on Supreme Court precedent which required courts to construe Title III liberally, the Tenth Circuit determined that plasma centers are indeed "service establishments" and thus subject to Title III.[315] The Fifth Circuit

306. 42 U.S.C. § 12182.

307. *Id.* § 12181(7)(F) (emphasis added).

308. 828 F.3d 1227 (10th Cir. 2016).

309. *See id.* at 1229–30.

310. *See id.* at 1229 (explaining that the plaintiff had tried to donate plasma at one of Octapharma Plasma's plasma centers).

311. *See* Matheis v. CSL Plasma, Inc., 936 F.3d 171, 175 (3d Cir. 2019) (stating that the plasma center "screens prospective donors for known health risks, extracts plasma from qualifying individuals, freezes it, and then ships it to manufacturing plants to be made into medicines").

312. *Levorsen*, 828 F.3d at 1229.

313. *See id.* ("In his complaint, Levorsen alleged that [plasma centers] like Octapharma are public accommodations because they are service establishments.").

314. *Id.* at 1230.

315. *See id.* at 1234 ("Accordingly, we conclude that [plasma centers] like Octapharma are service establishments under § 12181(7)(F). And because they are service establishments under § 12181(7)(F), they are public accommodations for purposes of Title III.").

disagreed.[316] In *Silguero v. CSL Plasma, Inc.*,[317] it held that the plasma center "does not offer plasma collection as a 'service' to a customer and is therefore not a 'service establishment.'"[318] One year later, in *Matheis v. CSL Plasma, Inc.*,[319] the Third Circuit examined the issue and sided with the Tenth Circuit.[320] It, too, held that plasma centers are "service establishments" under the ADA.[321] The circuits all agreed that plasma centers are "establishments."[322] The dispute concerned whether plasma centers provide a "service" within the meaning of Title III.[323]

The Tenth and Fifth Circuits noted that remedial statutes like the Americans with Disabilities Act must be liberally construed.[324] New textualists reject this proposition.[325] Based on Justice Gorsuch's reluctance to rely on canons of construction to depart from the literal construction of a statute, muscular textualists reject this proposition as well.[326] But that alone will

316. *See* Silguero v. CSL Plasma, Inc., 907 F.3d 323, 329 (5th Cir. 2018) ("We disagree with the Tenth Circuit . . . about whether plasma collection centers provide a 'service' to customers.").

317. 907 F.3d 323 (5th Cir. 2018).

318. *Id.* at 332.

319. 936 F.3d 171 (3d Cir. 2019).

320. *See id.* at 174 ("We conclude . . . that the Tenth Circuit got it right: the ADA applies to plasma donation centers.").

321. *Id.* at 178.

322. *See* Levorsen v. Octapharma Plasma, Inc., 828 F.3d 1227, 1231–34 (10th Cir. 2016) ("An establishment is a 'place of business' . . . . [Plasma centers] like Octapharma are 'place[s] of business.'" (quoting *Establishment*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (2002)) (second brackets in original)); *Silguero*, 907 F.3d at 328 (stating that there is no dispute in the case as to whether "CSL Plasma is an 'establishment'"); *Matheis*, 936 F.3d at 177 (agreeing with the Tenth Circuit).

323. *Compare Levorsen*, 828 F.3d at 1234 (concluding that plasma centers do provide a service), *with Silguero*, 907 F.3d at 332 (concluding that plasma centers do not provide a service).

324. *See Levorsen*, 828 F.3d at 1230 ("[C]ourts must construe § 12181(7)(F) liberally to afford individuals with disabilities access to the same establishments available to those without disabilities."); *Silguero*, 907 F.3d at 329 ("[E]ven when a statute is to be construed liberally, it is still not untethered from its text.").

325. *See* SCALIA & GARNER, *supra* note 21, at 364–366 (criticizing "[t]he false notion that remedial statutes should be liberally construed").

326. *See supra* note 115 and accompanying text; BP P.L.C. v. Mayor of Baltimore, 141 S. Ct. 1532, 1538–39 (2021)

not resolve the circuit split as to whether plasma centers are subject to Title III.

The dissenting opinion in the Tenth Circuit relied on two canons of construction to determine the "plain meaning of the statutory terms:"[327] *ejusdem generis*, which provides that "when a general term follows a specific one, the general term should be understood as a reference to subjects akin to the one with specific enumeration," and *noscitur a sociis*, which provides that a term is "given more precise content by the neighboring words with which it is associated."[328] It asserted that "such canons of statutory construction are aids in construing the language itself—not tools to be relied on only in the face of ambiguity."[329] A muscular textualist would disagree.[330] But this, too, will not resolve the circuit split, because a muscular textualist must first seek to determine the statute's plain meaning by looking to the definitions of its terms.[331]

The dissent in the Tenth Circuit also cautioned against "the analytical misstep of concluding that the unambiguous meaning of a statutory term may be divined perforce from the meaning of its component terms."[332] Muscular textualism embraces this approach.[333] Therefore, a "service establishment," as that term is used in § 12181(7)(F) "is—unsurprisingly—an establishment that provides a service."[334] An "establishment" is defined as a "place of business or residence together with all the things that

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> This court has no license to give statutory exemptions anything but a fair reading. Exceptions and exemptions are no less part of Congress's work than its rules and standards—and all are worthy of a court's respect. . . . Whatever the reason for a legislative compromise, we have no right to place our thumbs on one side of the scale or the other. (internal quotations omitted).

327. *Levorsen*, 838 F.3d at 1236 (Holmes, J., dissenting).

328. *Id.* at 1237 (internal quotations omitted).

329. *Id.*

330. *See supra* note 115 and accompanying text.

331. *See supra* Part II.A.

332. Levorsen v. Octapharma Plasma, Inc., 828 F.3d 1227, 1241 (10th Cir. 2016) (Holmes, J., dissenting).

333. *See* New Prime Inc. v. Oliveira, 139 S. Ct. 532, 539–40 (2019) (interpreting the statutory term "contract of employment" with reference to the meaning of "contract" and "employment").

334. *Levorsen*, 828 F.3d at 1231 (majority opinion).

are an essential part of it."[335] Plasma centers are "establishments."[336] The question is whether they provide a "service."

"Service" is "an act of helping or benefiting," "friendly or professional assistance," or the act of supplying "(a person) *with* something."[337] Contrary to the position of the Tenth Circuit dissent, payment to the service provider (the plasma center) is not required.[338] The Fifth Circuit reasoned that plasma centers are not service establishments because they "do not provide any detectable benefit for donors."[339] The Third Circuit rejected this conclusion, and the Tenth Circuit also concluded that plasma donors receive a benefit from the plasma center.[340] The Third and Tenth Circuits' conclusion is reasonable and would likely prevail. Further, at least one of the definitions of "service" indicates that a service establishment may not have to provide a clear benefit.[341] Either way, a muscular textualist interpretation of § 12181(7)(F) would likely conclude that plasma centers are subject to Title III.

The construction of "service establishment" in this context has consequences that reach beyond plasma centers. At least one court has already relied on the Tenth Circuit's opinion in

335. *Establishment*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1993); *see Establishment*, BLACK'S LAW DICTIONARY (6th ed. 1990) (defining "establishment" as "[a]n institution or place of business with its fixtures and organized staff").

336. *See supra* note 322 and accompanying text.

337. *Service*, OXFORD ENGLISH DICTIONARY (2d ed. 1989); *see Service*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1993) (defining "service" as "an act done for the benefit or at the command of another").

338. *See Levorsen*, 828 F.3d at 1240 (Holmes, J., dissenting) ("[S]ervice establishments offer services to the public in exchange for a fee.").

339. Silguero v. CSL Plasma, Inc., 907 F.3d 323, 330 (5th Cir. 2018).

340. *See* Matheis v. CSL Plasma, Inc., 936 F.3d 171, 178 (3d Cir. 2019) (finding the requirement that the donor receive a benefit satisfied); *Levorsen*, 828 F.3d at 1234 (majority opinion) (concluding that plasma centers help "those who wish to provide plasma for medical use—whether for altruistic reasons or for pecuniary gain—by supplying the trained personnel and medical equipment necessary to accomplish that goal").

341. *See Service*, OXFORD ENGLISH DICTIONARY (2d ed. 1989) (defining "service" as the act of supplying "(a person) *with* something").

Levorsen in a different context.[342] A narrow construction of Title III would severely undermine its "broad remedial purpose"[343] "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[344] In this instance, muscular textualism's literalness does not undermine the statute's remedial power.

Justice Gorsuch's writing makes clear that he is cognizant of the judge's proper role, and that he endeavors to be respectful of Congress when interpreting statutes.[345] But when the statute's broad remedial purpose is abundantly clear, as in the case of individual rights statutes enacted to combat pervasive discrimination, the restrictive construction that often results from muscular textualist statutory interpretation stands in contrast to his purported legislative deference.

CONCLUSION

The interpretive analysis exemplified in Justice Gorsuch's statutory interpretation opinions demonstrates a progression toward an increasingly literal methodology that rejects much of the context that new textualists routinely consider.[346] Justice Gorsuch's appointment to the Supreme Court provides the forum from which he can advocate for muscular textualism. It is probable that his theories, like Justice Scalia's, will gain traction. In some cases, this interpretation will broaden a statute's reach, as it did in *Bostock*, allowing the statute to provide relief to a greater number of plaintiffs.[347] In others,

342. *See* J.H. v. Just for Kids, Inc., 248 F. Supp. 3d 1210, 1221 (D. Utah 2017) (relying on *Levorsen* to determine whether Habilitation Independence Vocational Education Socialization programs are subject to Title III).

343. Levorsen v. Octapharma Plasma, Inc., 828 F.3d 1227, 1235 (10th Cir. 2016) (Holmes, J., dissenting).

344. 42 U.S.C. § 12101(b)(1).

345. *See, e.g.*, GORSUCH, *supra* note 50, at 9–10 (describing the important role that separation of powers among the branches of the federal government plays); Bostock v. Clayton County, 140 S. Ct. 1731, 1739 (2020) (same); Va. Uranium Inc. v. Warren, 139 S. Ct. 1894, 1900 (2019) (explaining the requirement of legislative deference in statutory interpretation); Pereida v. Wilkinson, 141 S. Ct. 754, 767 (2021) (stating that Congress's "policy choice, embodied in the terms of the law Congress adopted, commands this Court's respect").

346. *See supra* Part II.

347. *See supra* Part III.B.

muscular textualism will severely restrict the statute's remedial scope.[348] Scholars and judges who worry about unconstrained judicial discretion will applaud muscular textualism's formulaic qualities. Others will condemn its frequently narrow interpretations.

Justice Gorsuch's influence will reach beyond statutory interpretation. He has already demonstrated that he will interpret treaties[349] and the Constitution[350] literally and with little regard for decades, or even centuries, of precedent.[351] How the principles underlying muscular textualism impact these diverse legal questions is beyond the scope of this Note. But Justice Gorsuch's jurisprudence suggests reconceptualization of age-old doctrine across diverse areas of the law.[352] This Note examines his potential impact on statutory interpretation, but scholars and judges will have to grapple with his jurisprudence in other areas of the law as well. To ensure that our individual rights and freedoms remain protected, we must understand how these presumptively neutral methodologies threaten them. Without this knowledge, our rights are in grave danger.

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348. *See supra* Part III.A.

349. *See* McGirt v. Oklahoma, 140 S. Ct. 2452, 2468–70 (2020) (stating that treaties between the federal government and Native American tribes must be interpreted in the same way as statutes and refusing to consider "extratextual evidence"); *see also* Matthew L.M. Fletcher, *Muskrat Textualism*, 115 NW. U. L. REV. (forthcoming Jan. 2022) (manuscript at 53), https://perma.cc/9ZM9-JA4P (stating that "the core focus" of Justice Gorsuch's analysis in *McGirt* was "on the legislative text").

350. *See* Carpenter v. United States, 138 S. Ct. 2206, 2264 (2018) (Gorsuch, J., dissenting) (arguing that the Fourth Amendment does not protect reasonable expectations of privacy, and that "its plain terms" only permit its invocation when "one of your protected things (your person, your house, your papers, or your effects) is unreasonably searched or seized").

351. *See* Gamble v. United States, 139 S. Ct. 1960, 1999, 2009 (2019) (Gorsuch, J., dissenting) (advocating for the court to overrule 170 years of precedent interpreting the Double Jeopardy Clause of the Fifth Amendment because that precedent is "[w]ithout meaningful support in the text" and "[t]he separate sovereigns exception was wrong when it was invented, and it remains wrong today").

352. *See* cases cited *supra* notes 349–351; Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1038–39 (2021) (Gorsuch, J., concurring in the judgment) (questioning the continued validity of Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945)).